Supreme Court U.S.
FILED
JUL 6 2004
OFFICE OF THE CLERK

No. 04 50

In The

Supreme Court of the United States

Ethan E. Allen *Pro Se*

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

On Petition For Writ Of Certiorari

To The United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit Court of Appeal improperly concluded that it lacked jurisdiction to consider a federal employee's appeal of the MSBP and related administrators' denial of his disability retirement application when on appeal the appellant raised questions of serious procedural and substantive law errors committed by MSPB rather than challenged the MSPB's interpretation of medical evidence?[1]

2. Whether an MSPB decision that does not set forth the appropriate standards which it used to deny a disability retirement application and/or issues a denial that directly contradicts other MSPB decisions embodies an arbitrary MSPB decision necessitating a reversal by the Federal Circuit Court with instructions to apply the appropriate, non-arbitrary legal standards?

3. Whether under Title 5 C.F.R. . § 1201.115 a federal employee is entitled to disability retirement benefits when, because of a medical condition, he is A) regularly using Leave Without Pay (LWOP) that has been disapproved in advance or B) only providing part time service in a full time position or C) only working with informal and impermanent accommodation or D) demonstrating

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[1] In Petitioner ETHAN ALLEN's case the Federal Circuit Court of Appeal relied primarily on *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 791 (1985)) as the basis for denial of jurisdiction. In *Lindahl*, the Supreme Court ruled: "Only the questions [sic] of disability itself, which is a question of medical fact, is actually barred from judicial review."

attendance that has justified removal in other cases, or E) exhibiting performance that warrants denial of a within-grade increase or other remedial action.

LIST OF ALL PARTIES TO THE PROCEEDING

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OPINIONS BELOW

On March 15, 2001 the United States Office of Personnel Management ("OPM") affirmed its initial August 14, 2000 decision disallowing Petitioner's application for disability retirement. (March 15, 2001 Office of Personnel Management letter to Ethan E. Allen.) (A true and correct copy of the March 15, 2001 decision is attached hereto as Appendix A.)

On August 14, 2001 an Administrative Law Judge ("ALJ") of the United States Merit Systems Protection Board (the "Board") affirmed the OPM's decision. (*Allen v. Office Of Personnel Management*, United States of America Merit Systems Protection Board Western Regional Office Docket Number SF-844E-01-0326-M-1.) (A true and correct copy of the August 14, 2001 decision is attached hereto as Appendix B.)

The ALJ's initial decision became the final decision of the Board on April 30, 2002 after the Board denied Petitioner's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. (*Allen v. Office of Personnel Management*, No- SF-844E-Q1-0326-t-1.) (A true and correct copy of the April 30, 2002 decision is attached hereto as Appendix C.)

Petitioner timely appealed the Board's decision to the Federal Circuit Court of Appeal. Upon motion of the government, on October 17, 2003 the case was remanded to the Board for it to consider whether there were problems with Petitioner's attendance at work, which would constitute a work deficiency and thus support his application for disability retirement. (*Allen v. Office of Personnel Management*, Federal Circuit Court of Appeal Case No. 02 –3295.) (A true and correct copy of the October 17, 2002 order is attached hereto as Appendix D.)

On September 30, 2003, the Board declined to reconsider its April 30, 2002 decision denying Petitioner's petition for review. The ALJ's initial decision thus remained the final decision of the Board. (A true and correct copy of the decision is attached hereto as Appendix E.)

The United States Court of Appeals For The Federal Circuit issued its Decision dismissing Petitioner's Appeal for lack of jurisdiction on April 9, 2004. (*Allen v. Officer of Personnel Management*, U.S. Court of Appeals Case No. 04-3077.) (A true and correct copy of the decision is attached hereto as Appendix F.)

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Rules of the United States Supreme Court Rule 10 and 28 U.S.C. Section 1254. In its April 9, 2004 Order (Appendix E hereto) the Federal Circuit Court of Appeals decided important federal questions in ways that conflict with relevant decisions of the United States Supreme Court and other federal Appellate Circuits.

FEDERAL STATUTORY PROVISIONS

5 U.S.C. Section 8461: see APPENDIX G

5. C.F.R. Section 1201.115: see APPENDIX H

5 C.F.R. Section 844.103: see APPENDIX I

STATEMENT OF THE CASE

A. MR. ALLEN'S EMPLOYMENT AND INJURY

In October of 1989, Petitioner ETHAN E. ALLEN ("MR. ALLEN") became a federal employee under the Federal Employee Retirement System ("FERS"), working at the Naval Weapons Station Concord as a Computer Scientist.

In December of 1995, after six years of employment, MR. ALLEN was seriously injured in a car crash on his way to work. Subsequent to this, MR. ALLEN complained of and was treated for chronic pain. MR. ALLEN was absent from work on numerous occasions for treatment for or because of incapacitation due to pain.

B. MR. ALLEN'S INJURIES RESULT IN NUMEROUS ABSENCES FROM WORK

MR. ALLEN was absent from work on a total of 257 days for treatment for or because of incapacitation due to pain. MR. ALLEN requested and was granted sick leave to cover these absences through December 1996 when appellant exhausted his supply of sick leave. In the winter of 1996, MR. ALLEN received notation on his annual performance review ("PARS") that his attendance was a concern to management. In March 27, 1997, his physician recommended that he quit his current federal employment.

After exhausting his supply of sick leave, MR. ALLEN requested and was granted annual leave and leave without pay ("LWOP") in addition to sick leave as it accumulated to cover time lost from work.

In October of 1998, MR. ALLEN submitted two requests for LWOP to attend therapy and they were each rejected by his second level supervisor. The supervisor's stated position was that working part time in a full time position and filling the un-worked hours with LWOP and annual leave and sick leave was not acceptable. She further informed MR. ALLEN that his then-current attendance was "abnormal" and could result in "adverse action" for being Absent Without Leave (AWOL). MR. ALLEN did not contest this possibility, given that the record shows: 1) he was in a full time position defined as working 80 hours per pay period; 2) between the date of the car crash in 1995 and his separation in 1999, MR. ALLEN's medical condition had caused absences resulting in his working less than 80 hours each pay period (with the exceptions of one pay period in 1997); and 3) that most authorizations for absence were requested and/or approved after absence began and after the time at which MR. ALLEN was regularly scheduled to arrive at work.

C. MR. ALLEN'S APPLICATION FOR DISABILITY RETIREMENT IS DENIED AND HE IS TERMINATED

In December 1998, MR. ALLEN discussed disability retirement with his second level supervisor and was directed to proceed with the application process. In

March 1999, the second level supervisor again directed him to proceed with the disability application, this time by requesting a supervisor's statement from the first level supervisor. Eventually he received the statement via an acting first level supervisor.

By November of 1999 MR. ALLEN had received all of the necessary paperwork to submit a full disability retirement application. This paperwork included agency certification that there were no open available positions. On November 15, 1999 he thus applied to the Office of Personnel Management ("OPM") for disability retirement from the Information Technology Department – Concord [California] Detachment, Software Engineering Division. Specifically, MR. ALLEN applied for retirement from the full time position of "Scientist 4c50419000." However, MR. ALLEN's disability retirement application was rejected and he was terminated as part of a Reduction in Force ("RIF") on November 30, 1999.

D. THE POST DENIAL LITIGATION AND HOW THE CERTIORARI ISSUES WERE RAISED BELOW

OPM disapproved MR. ALLEN's disability retirement application and he timely appealed to the Merit Systems Protection Board (MSPB). His primary argument was that he was performing part time service in a full time position due to a disabling medical condition, that this was not "useful and efficient service" as defined by the relevant laws for disability retirement, that it was undisputed that MR. ALLEN met the other requirements for entitlement to disability retirement and thus the court should reverse OPM's decision. Other significant issues raised included:

1. The ALJ's failure to correctly apply the criteria for disability retirement as set forth in 5 C.F.R. Section 844.103 and that MR. ALLEN met this criteria. (see Appendix 0 page 104)
2. MR. ALLEN's agency certification to OPM that there were no available positions was generated by the RIF process, and that nothing in 5 C.F.R. precludes this certification being sufficient for a disability retirement application.

3. MR. ALLEN's supervisor had reported that MR. ALLEN was unable to consistently maintain a full work schedule. (See appendix A page 2)

4. MR. ALLEN had requested a reasonable accommodation in the form of a part-time work schedule, and that this request was denied.

Administrative Judge LuNell C. Anderson held a hearing for this case on August 14, 2001, and determined that MR. ALLEN was able to perform his duties when present[1], and affirmed OPM's decision. (See Initial Decision – APPENDIX B.) MR. ALLEN then appealed to the Court of Appeals for the Federal Circuit, again raising the issues enumerated above.

MR. ALLEN timely appealed to the Federal Circuit. In this appeal, MR. ALLEN raised the issues that the Court had applied the wrong laws and that the court had committed procedural errors as now raised in this Petition.

On August 20, 2002, the Attorneys for Respondent made an unopposed motion to remand this case to the MSPB for further consideration. (see Respondents Unopposed Motion for Remand – APPENDIX J) On June 27, 2003, the Court of Appeals for the Federal Circuit granted Respondent's request, and remanded the case for the MSPB to address the three issues raised by Respondent and approved by MR. ALLEN: (1) What is the legal standard for determining when attendance problems constitute a deficiency? (2) Did the appellant demonstrate a deficiency

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[1] As noted in the November 2003 appeal to the Federal Circuit, (APPENDIX L page 69), this decision is inconsistent with the court in **TERRY L. DAVIS, v. OFFICE OF PERSONNEL MANAGEMENT**, Agency. (CSA 8 114 947) MSPB DOCKET Number CH-844E-99-0566-I-1 DATE: September 13, 2001.

> the appellant was unable to work a 40-hour week. IAF Tab 3, Subtab IIB. To the extent that this may imply an ability to perform any of her duties for a shorter period, we note that a full-time employee who cannot be placed in a full-time position has not been reasonably accommodated.

in attendance? (3) If there was a deficiency, was the appellant's employing agency accommodation of that deficiency temporary or permanent?

Then MSPB requested arguments and in the Reply by Appellant to Agency Response to MSPB Order, MR. ALLEN again argued that the ALJ had misinterpreted 5 U.S.C. 8451 AND 5 CF.R. 844.103(a) (see APPENDIX 0 page 104) and that this misinterpretation was improperly affirmed summarily by the Board.

On September 30, 2003, the MSPB declined to reconsider its decision and MR. ALLEN pursued his matter in the Court of Appeals for the Federal Circuit, raising the issues he raised below through its administrative appeals and by way of his joining in the Respondent's unopposed motion for remand and specifically raising the issue that the Federal Circuit had remanded the case to MSPB for resolution of legal issues that were still unresolved.

The Court of Appeals for the Federal Circuit incorrectly determined that the appeal was directed at the MSPB's errors in its factual findings, cited *Anthony v. Office of Personnel. Management,* 58 F.3d 620, 626 (Fed. Cir. 1995) and *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 791 (1985), and held that the Court of Appeals for the Federal Circuit had no jurisdiction to hear MR. ALLEN's appeal.

REASONS FOR GRANTING THIS PETITION FOR CERTIORARI

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OF OTHER APPELLATE COURTS

To establish entitlement to a disability retirement annuity, the employee must show, by a preponderance of the evidence, that he is unable because of disease or injury to render useful and efficient service in his position, that the condition will continue for at least one year, and that he is not qualified for reassignment to a vacant position in the employing agency at the same grade or level in which he would be able to render useful and efficient service. The

final determination must be based on the probative value of all the evidence submitted, taking into account objective clinical findings, diagnoses and medical opinions, subjective evidence of pain and disability, and all evidence relating to the effect of the applicant's condition on his ability to perform in the position last occupied. (*Chavez v. Office of Personnel Management*, 6 MSPB 343, 6 M.S.P.R. 404, 423 (1981).) The persuasiveness of a medical report stems from its explanation of how certain aspects of a particular condition render the employee unable to perform specific work requirements. (Id.)

In *Lindahl*, this Court acknowledged that as to MSBP decisions, questions of fact can be reviewed to determine whether the administrative factfinder exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence. The Court also held that procedural or constitutional questions may be raised in federal Court. Put another way, "Only the questions *[sic]* of disability itself, which is a question of medical fact, is actually barred from judicial review by section 8347(c)." (*Lindahl*, 470 U.S. *supra* at 784, 791. (internal quotes and references omitted).) The Court concluded by affirming that "MSPB decisions concerning retirement disability claims are reviewable in the first instance by the Federal Circuit pursuant to the jurisdictional grants in 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9)." (*Lindahl*, 470 U.S. *supra* at 800.)

The Federal Circuit Court had jurisdiction and should have exercised that jurisdiction to review and remedy the MSBP's complete *failure to decide MR. ALLEN's case based on the appropriate substantive and procedural criteria*. As indicated by the Respondent's unopposed motion for remand, the administrative decisions embodied incomplete and hence erroneous analysis of the following important substantive and procedural issues: *(1) What is the legal standard for determining when attendance problems constitute a deficiency? (2) Did the appellant demonstrate a deficiency in attendance? (3) If there was a deficiency, was the appellant's employing agency accommodation of that deficiency temporary or permanent?* In acknowledgement thereof, the Federal Circuit Court remanded the case back to the administrative level, but to no

avail – the substantive and procedural issues remained unaddressed. On appeal MR. ALLEN raised the issue of whether failing to decide the important issues raised on remand in fact rendered the administrative decisions erroneous and the Federal Circuit Court ignored this aspect of MR. ALLEN's appeal.

The Federal Circuit Court had jurisdiction to review and should have corrected the *erroneous substantive determinations actually reached* by MSPB's misconstruction of the governing legislation - 5 C.F.R. § 844.103(a)(2) (disability "resulting in a deficiency in performance, conduct or attendance" is the equivalent of "unable to render useful effective service" rendering employee eligible for requirements) (emphasis added). Below, the ALJ consistently commented on MR. ALLEN's ability to meet performance requirement, but did not address the attendance issue. (See Appendix J) Put another way, it treated the attendance requirement as only part of what is to be considered when determining MR. ALLEN's ability to perform rather than a separate criterion for determining his entitlement to disability retirement. (*Id*; see also, BRENDA J. COMBS v. SOCIAL SECURITY ADMINISTRATION-MSPB DOCKET NUMBER SF-0752-00-0107-I-3 DATE: February 26, 2002 in APPENDIX K) Such substantive errors go to the heart of the administrative determination and require correction by the Court. (See *Anthony,* 58 F.3d *supra* at 626 and *Lindahl,* 470 U.S. *supra* at 791 (holding errors that go to the heart of the administrative decision are reviewable by the Circuit Court).)

Moreover, the Federal Circuit Court had jurisdiction to reverse MSPB's failure to follow proper burden-shifting procedures. In order to obtain disability benefits, MR. ALLEN had to demonstrate that he was not offered a permanent accommodation. (*Bruner v. Office of Personnel Management,* 996 F.2d 290 (Fed. Cir. 1993). As reflected in Respondent's unopposed motion for remand, during the administrative proceedings MR. ALLEN met his initial burden of proof establishing that the accommodation he received was temporary. (See APPENDIX J, citing to *Malan v. Department of Air Force*, 55 M.S.P.R. 283, 295 (1992) (indirect evidence that accommodation is temporary satisfies employee's burden of proof); see also APPENDIX

J (setting forth facts establishing temporary nature of the accommodation).) By failing to recognize this fact and shift the burden of production to the agency, the MSPB committed substantial departures from important procedural rights. (*Id.*; *Bruner,* 996 F.2d *supra* at 294; 5 C.F.R. Section 1201.115.) The Circuit Court has jurisdiction to correct and should have corrected such departures. (*Bruner,* 996 F.2d *supra* at 291.)

MR. ALLEN's Appellate Brief clearly set forth other instances in which the Federal Circuit Court and the MSPB reached erroneous determinations because each misconstrued the governing legislation. These arguments, reference below, were each improperly ignored by the Federal Circuit.

The Federal Circuit Court cited *Anthony v. Office of Personnel Management,* 58 F.3d 620 (Fed. Cir. 1993) in support dismissing MR. ALLEN's appeal for lack of jurisdiction. However, a close comparison of the two cases clearly indicates that the Federal Circuit did have jurisdiction over important issued raised by MR. ALLEN.

In *Anthony*, "Petitioner asserts that the Board 'misread, overlooked and failed to properly interpret medical evidence.'" (*Anthony*, 58 F.3d *supra* at 624.) Further the *Anthony* court found that "Petitioner does not assert that the Board's disability findings implicated any procedural, legal, or other fundamental error;" (*Anthony*, 58 F.3d *supra* at 626.)

In MR. ALLEN's case the Office of Personnel Management stated, "The final decision finds that Mr. Allen was absent from work as a result of his injuries." (See APPENDIX J) and so MR. ALLEN expressed no need for judicial review of medical evidence. What is still at issue is the legal definition of attendance deficiency as it relates to "useful and efficient service" for the purposes of disability retirement. MR. ALLEN asserts that OPM committed a procedural, legal, and fundamental error by using an incomplete definition of "useful and efficient service" as it relates to service deficiency. According to OPM:

> "It appears that the board may have found that there was <u>no service deficiency</u> because Mr. Allen was able to perform his job when he was in

attendance. A7-8. If that was the board's finding, then the finding is incomplete; the principal basis of Mr. Allen's claim for disability retirement was his attendance problem — not an inability to perform required tasks."

(See Appendix J)

Several other key differences between *Anthony* and MR. ALLEN's case clearly indicate that the Court had jurisdiction to determine the issues raised by MR. ALLEN.

The court found that *Anthony* was not qualified for disability retirement because he declined a reasonable accommodation offer (*Anthony*, 58 F.3d *supra* at 623.)(APPENDIX N page 89) MR. ALLEN has not declined any such offers. Rather, MR. ALLEN was offered an informal accommodation while in *Anthony* the offer was formal. KAREN R. GOMETZ v. Officer of Personnel Management, MSPB Docket No. PH-831E-95-0106-I-2 Date: 1995 (69 M.S.P.R. 115 (1995).) holds that informal accommodations are not a bar to disability retirement.

Moreover, in both *Anthony*, and in MR. ALLEN's case, the appealing party claimed that the accommodations were not full time. In *Anthony*, 58 F.3d *supra* at 623 (APPENDIX N page 84), the ALJ found "because Petitioner had never reported for work, his concern that the hours would be less than full-time was purely speculative." Anthony had been offered a full time position but never reported to work for this position; he filed for disability on the grounds that his physician had written that it was possible that Anthony would have trouble working a 40 hour week. The court further opinioned that the accommodation in *Anthony* was full time and would remain a full time accommodation UNTIL *Anthony* started working a reduced schedule. This is a critical difference from MR. ALLEN's case because in MR. ALLEN's case the ALJ found that MR. ALLEN had already started working less than full time. Properly applying *Anthony* leads to the conclusion that the accommodation in MR. ALLEN's case was part time, and part time accommodations do not bar disability retirement.

In *Anthony* and in MR. ALLEN's case, the appealing party claimed that the accommodations were not permanent.

In *Anthony* 58 F.3d *supra* at 628 (APPENDIX N page 86), the court found that "nothing in the record suggests impermanence", so in absence of an indication that the accommodation was impermanent, the Court determined that Anthony was not eligible for disability retirement. (*Id.*) But in MR. ALLEN's case, OPM identifies several parts of the record that that suggest impermanence (See Appendix J page 43, "Mr. Allen presented to the board documentary evidence that the agency had refused to accommodate his attendance problems on a permanent basis:"). For this and all of the reasons referenced above, MR. ALLEN's case differs from *Anthony v OPM* in exactly those areas that rendered the Federal Circuit without jurisdiction in Anthony but with jurisdiction in MR. ALLEN's case. (In other words, the cases differ on exactly those points that the Anthony court indicated would have changed the outcome in *Anthony*.)

II. THE COURT FAILED TO REVIEW A CLEARLY ARBITRARY DECISION BELOW

According to 5 C.F.R 706.1(2)(A), the Federal Circuit Court has jurisdiction to review arbitrary decisions. As argued below and on appeal, the administrative decisions made as to MR. ALLEN were both arbitrary internally and as compared to similarly situated employees in other cases.

In dismissing MR. ALLEN's appeal, the Federal Circuit Court let stand MSBP's arbitrary and erroneous failure to address the following important substantive and procedural questions:

1) What is the legal standard for determining when attendance problems constitute a deficiency in the context of the Code of Federal Regulations Title 5?

2) What laws and procedures must OPM apply in administering the Civil Service Retirement Act while determining "Did the appellant demonstrate a deficiency in attendance"?

3) Is regular use of unscheduled Leave Without Pay (LWOP) so that an employee is providing part time service in a full time position a reasonable and permanent accommodation for full time employees

who are able to perform useful and efficient service only on a part time basis?

As reflected in these questions, key to this case is the legal standard for determining when attendance problems constitute a deficiency. Without setting forth this standard or applying it to the facts of MR. ALLEN's case, the administrative determinations that MR. ALLEN's attendance problem was or was not a deficiency is arbitrary.

Moreover, the administrative decision denying MR. ALLEN's disability retirement on the grounds that he was providing 'useful and efficient service' was arbitrary when compared to other attendance cases and OPM's own guidance on 'useful and efficient service'

FERS Disability Facts (See Appendix M, page 75) provides the following Definition and Note

Definition of Useful and Efficient Service:

- *Acceptable performance of the critical or essential elements of the position or the ability to perform at that level, and*
- *Satisfactory conduct and attendance.*

***Note**: Service which is not "useful and efficient" is a level of performance or attendance which, if it were to continue, would warrant denial of a within-grade increase, demotion, separation, or other remedial action.*

The definition of useful and efficient service references 'essential elements'. The Firth Circuit has ruled, "Other courts are in agreement that regular attendance is an essential function of most jobs." (see Appendix Q).

The note delineating service which is not useful and efficient does not refer to any past within-grade increase, but instead specifically addresses if there would be a denial of a within-grade increase if the level of attendance continued into the future.

Of the 4 items in the Note above, MR. ALLEN's level of attendance warranted all 4.

- Denial of within grade increase – The transcript of the testimony of Ingrid Fields shows that MR. ALLEN's performance and attendance warranted denial of a within grade increase. Her words on the subject are "*Now, did I see that you were excelling to the point that I felt that you deserved a bonus or you deserved an increase in salary? No,*"[2] (emphasis added) (see APPENDIX M page 75)

- Demotion – MR. ALLEN's attendance warranted a demotion in that he was unofficially working a part time schedule in a full time position, and had been doing so for nearly four years. A change from a full time schedule to a part time schedule is a demotion.

- Separation –. MR. ALLEN's level of attendance warranted separation in that 1) it is undisputed that MR. ALLEN's medical condition caused many unscheduled absences from work on a continuing basis and that these absences were charged to LWOP *retroactively*. 2) the following cases demonstrate that federal employees warranted removal from employment for being absent without prior approved leave for as little as one hour: DANIEL T. HOWARD, JR. v. DEPARTMENT OF THE ARMY, MSPB Docket No.PH075209128 Date: May 15, 1981; BILLY J. LEMONS v. DEPARTMENT OF THE AIR FORCE, MSPB DOCKET No. DA7521390136, Date: June 22, 1982, and EMERY RICHARDSON v. DEPARTMENT OF JUSTICE DOCKET MSPB DOCKET No. SF07528110018, Date: April 21, 1982. (see Appendix M) .), MR. ALLEN's second level supervisor informed him, in writing, that his attendance could result in 'adverse action' because

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[2] MR. ALLEN received a satisfactory performance appraisal from his last supervisor of record and so the ALJ determined that he had received his latest within-grade increase. However, MR. ALLEN was in a 'pay banding' pilot program that allowed management to set the amount of this increase; Due to MR. ALLEN's attendance, management set the amount of the increase at zero.

his current level of attendance was abnormal and unacceptable.

- Other Remedial Action – MR. ALLEN's attendance warranted his first line supervisor placing him on an electronic sign in and out (remedial action) because of his irregular attendance. (see Appendix M page 76)

MSBP's decision that MR. ALLEN was not entitled to disability benefits was arbitrary and erroneous with respect to the following cases:

1. United States Court of Appeals for the Federal Circuit 00-3133 ***FRANK E. MARINO v OPM***;
2. ***MATTIE M. COLE V. OPM*** MSPB Docket Number AT-844e-00-0295-I-1. (March 16, 2001)
3. ***BRENDA J COMBS V SSA*** MSPB Docket Number SF-0752-00-0107-I-3 DATE: February 26, 2002;
4. ***ALLEN B. BYERS v UNITED STATES POSTAL SERVICE,*** MSPB Docket Number SE-0752-97-0354-I-1 – DATE: JUN 5, 1998;
5. ***KENNETH WESLEY, v. UNITED STATES POSTAL SERVICE,*** MSPB DOCKET NUMBER NY-0752-02-0150-I-1 DATE: September 16, 2003;
6. **TERRENCE A. STRATTON, v. UNITED STATES POSTAL SERVICE,** MSPB DOCKET NUMBER CH-0752-00-0220-I-1 DATE: August 22, 2001.

With respect to United States Court of Appeals for the Federal Circuit 00-3133 ***FRANK E. MARINO v OPM.*** In the Marino case, the court held that the accommodation was not official and so was not an accommodation under the requirements for disability retirement. In the case of MR. ALLEN, the ALJ ruled that there was no accommodation, but that MR. ALLEN had been accommodated by liberal use of leave. (see Appendix J) This was then an unofficial accommodation and so MR. ALLEN should have been entitled to disability retirement when he was separated by RIF as in the January 17, 2001 decision *BRUCE A.*

BRACEY v. OFFICE OF PERSONNEL MANAGEMENT (see Appendix P).

With respect to ***MATTIE M. COLE V. OPM*** AT-844e-00-0295-I-1. (March 16, 2001). In *Cole*, the board ruled, "This is not a case where the existence of a disabling condition turns on "finely tuned correlations between particular medical impairments and specific job requirements." Mullins-Howard v. OPM 71 M.S.P.R. 619, 627 (1996). " Just like in *Cole*, the record shows MR. ALLEN was unable to perform full time attendance. In both cases, the appellants suffer headache that rendered appellant unable to work for hours or even days at a time. And in both cases, these episodes happen frequently.

With respect to ***BRENDA J COMBS V SSA*** MSPB Docket Number SF-0752-00-0107-I-3 DATE: February 26, 2002 (see Appendix K). In *Combs*, the court held that inability to maintain regular attendance was charged to employee providing part time service in a full time position; agency may bring an action based on inability to Maintain Regular Attendance against an employee for excessive approved absence, as long as certain criteria are met. This criteria was met in both *Combs v SSA* and the case of MR. ALLEN. (see Appendix M) But in one case, the court removed *Combs* from service for failure to provide useful and efficient service and in the other the ALJ ruled that MR. ALLEN was providing useful and efficient service.

With respect to ***ALLEN B. BYERS v UNITED STATES POSTAL SERVICE,*** MSPB Docket Number SE-0752-97-0354-I-1 – DATE: JUN 5, 1998. The court held that the employee's removal for failure to be regular in attendance was justified because the absences were approved after they happened. In the case of MR. ALLEN, the undisputed facts indicate that MR. ALLEN's medical condition caused many unscheduled absences from work on a continuing basis and that these absences were approved after they occurred. However Byers was removed from service while the ALJ in MR. ALLEN's Case ruled that MR. ALLEN was providing useful and efficient service and that the accommodation was likely to continue.

With respect to ***KENNETH WESLEY, v. UNITED STATES POSTAL SERVICE,*** MSPB DOCKET NUMBER

NY-0752-02-0150-I-1 DATE: September 16, 2003. This case defines the term "regular in attendance" as not more than three unscheduled absences in a six month period. *Wesley* was removed for not being regular in attendance while MR. ALLEN, who had more unscheduled absences than *Wesley*, was found to be providing useful and efficient service.

With respect to ***TERRENCE A. STRATTON, v. UNITED STATES POSTAL SERVICE,*** MSPB DOCKET NUMBER CH-0752-00-0220-I-1 DATE: August 22, 2001. In the *Stratton* case, the court ruled that to meet its burden to prove that the appellant failed to maintain a regular schedule due to unscheduled absences, the agency must show that for each absence the leave was not requested and approved in advance of its use. In the case of MR. ALLEN, the case file shows that most LWOP was approved *retroactively* and so not approved in advance; the case file even shows that LWOP requests to attend prescribed therapy were disapproved in advance. Stratton was removed from service, but the ALJ found MR. ALLEN to be performing useful and efficient service.

In the above cited cased, the courts determined that the federal employee had an attendance deficiency, and separated the employee from service. In MR. ALLEN's case, the courts aberrantly used some other legal standard for determining when attendance problems constitute a deficiency because the court ruled that MR. ALLEN did not have an attendance deficiency.

As argued in the administrative proceedings below and on appeal, the MSPB was arbitrary in its determination that MR. ALLEN was not disabled based on his attendance.

According to OPM in the Respondent's Unopposed Motion for Remand (Appendix J), one issue was whether the accommodations by the Navy were temporary or permanent. The question as raised by MR. ALLEN on appeal was not only if the accommodation was temporary or permanent, but also if it was a reasonable accommodation or not. The Navy's accommodation was to allow MR. ALLEN to perform part time service in a full time position, filling in the not worked hours with LWOP, further, these hours of LWOP were denied in advance and approved retroactively.

The footnote in Respondent's Unopposed Motion for Remand (Appendix J) shows that there was documentary evidence that this accommodation was unacceptable to the agency, and so was not a reasonable accommodation. But even if it was acceptable to the agency it was not a 'reasonable accommodation' that would preclude an award of disability retirement benefits because it was part time service in a full time position. It is well established that the placement of a full-time employee in a part-time position does not satisfy the agency's obligation to attempt to accommodate the employee's disabling condition. *See* 5 C.F.R. § 831.1201; *Marczewski v. Office of Personnel Management*, 80 M.S.P.R. 343, ¶¶ 9-10 (1999). For an accommodation to be a reasonable accommodation, however, it must be at the same grade or pay level and tenure as the employee's regular duties. *See* 5 C.F.R. § 831.502(b)(7). A change from a full-time to a part-time schedule is not considered to be at the same pay level. Federal Personnel Manual Supplement 831-1, subch. S10-4(k) (June 23, 1983) (See appendix L page 71).

CONCLUSION

For the reasons set forth above, this Court should grant certiorari in the instant case and reverse the decision of the courts below as to: (1) whether the Federal Circuit Court of Appeal has jurisdiction over MR. ALLEN's Appeal; and (2) whether MR. ALLEN is entitled to disability retirement benefits.

Date: July 1, 2004

Ethan E. Allen

ETHAN E. ALLEN, In Pro Se

APPENDIX A
March 15 2000 - OPM Letter of Denial of Reconsideration (CSA 8 140 644)

United States Office of Personnel Management

Washington, DC 20415-0001

March 15, 2001

ETHAN E. ALLEN

P0 BOX 70692

PT. RICHMOND, CA 94807

CSA 8 140 644

Dear Mr. Allen:

This is to inform you that based on your request we have carefully reconsidered the initial decision to disallow your application for disability retirement and have concluded that the initial decision was correct.

DISCUSSION

In your application for disability retirement you claim you are unable to perform the duties of a Scientist due to pain in your knee, neck, and back and headaches.

Our letter dated August 14, 2000 informed you of our initial decision and noted there was insufficient evidence to support your eligibility for disability retirement benefits. In addition, we informed you that the evidence in file does not support the conclusion that your conditions are disabling from performing the duties of your position or warrant your absence from the workplace altogether.

We have received your request for reconsideration. Also, we have since received the additional evidence you have submitted including reports and administrative

documentation dated intermittently from 1997 through 2000.

A review of the initial file includes the Supervisor's Statement. Your supervisor does not document a deficiency in your ability to perform any of the critical elements of your position. A review of your position description describes your job as mostly sedentary. The evidence in file does not support the conclusion that your conditions prevent you from performing useful and efficient service in your position.

The file also includes a copy of part of your performance appraisal for the time to October 1, 1997 through September 30, 1998. In the comments section of the appraisal your supervisor describes you as a person with extraordinary talent. When you are able to execute a full schedule your work and output adds value to your customers. In the performance appraisal your supervisor indicates that during the calendar year 1995 you have been unable to consistently maintain a full work schedule. Also, we note in your Applicant's Statement you state At times I hurt too much to work. At times my headache hurts too much to concentrate. Sometimes I get to work late. Sometimes I leave early" However, the evidence in file does not support the conclusion that your medical conditions prevent you from consistently attending the workplace altogether, for a period of one year more. Additionally, the initial file includes a copy of the Reduction in-Force Notice of Separation letter dated July 29, 1999. The letter indicates this reduction-in-force is necessary due to a lack of finding and you will be separated effective November 30, 1999.

- The evidence submitted on reconsideration includes the summary report by Dr. Malone of the Department of internal medicine dated November 25. 1998. Dr. Malone states you were seen on November 6, 1998 for evaluation for disability retirement. In the patient history section of the report you indicate you were injured

in an auto accident on December 22, 1995. You add since that time you have been in continuous pain in the neck, the low back, in your left knee. You state you were unable to return to work until March 17, 1996. This was when you began full time work again. You were completely off work for two weeks following the accident since that time, you have had to take a day off every week because of your continuous pain.

Dr. Malone mentions during the first three months following the accident you were seen by chiropractor, Dr. Dolberg. You later switched chiropractors and began seeing Dr. Bruce Delaphante. You state you have continued to see Dr. Delaphaute approximately every six weeks for the past two and one half years. You report despite this chiropractor treatment, your complaints of pain continue. However, the evidence in file does not include copies of all chiropractor progress notes for our review.

Dr. Malone mentions during the same treatment of time you have been seen at Kaiser Hospital in Richmond and Martinez, California. Dr. Malone indicates on March 13, 1998 you had arthroscopic surgery by Dr. Brown. You report despite this, you continue to have complaints of pain in the left knee. However, the evidence in file does not include progress notes, hospital discharge summary, or reports for this time period including from Dr. Brown,

Dr. Malone also indicates that prior to this, you had seen Dr. Baer of Kaiser hospital in Oakland and he advised to change your lifestyle in an attempt to treat the pain. This involved taking BART (public transportation) to work rather than driving and using an ergonomic chair at your workstation. He adds you report this did not make much difference in your pain level. We note, the evidence in file does not include progress notes or reports from Dr. Baer for our review. Further, the evidence in file does not show that an ergonomic evaluation of your workstation was conducted for specific recommendations and adjustments.

Also, we should note difficulty commuting to work, if the individual can perform the duties of the position after arriving at work is not a relevant consideration in a disability retirement determination.

Dr. Malone indicates that after three years your condition is chronic and it would appear, based on your symptoms, that it is likely to persist for the next year. He notes your condition does appear to be stable and he does not expect any sudden incapacitation due to your medical condition. Dr. Malone concludes given your complaints of pain, you should be given some degree of accommodation at your job to limit the amount of discomfort you continue to have.

However, Dr. Malone does not provide specific functional limitations in your ability to attend the workplace altogether or in your ability to perform the duties of your position. Additionally, the results of Dr. Malone's physical examination show that even though you do have tenderness mainly on the medially aspect of the knee there is no effusion present and no locking. Also, you have reasonably good range of motion. Dr. Malone makes reference to MRI examinations of the neck as well as the left knee. Copies of these test results are not in file for our review. Dr. Malone indicates the MRI of the neck was done on November 24, 1997 and is basically unremarkable The MRI of the knee was also done on November 24, 1997 and is unremarkable as well.

Further, Dr. Malone indicates you have been referred to the Pain Clinic. However, the evidence in file does not include all progress notes and the results of this recommended treatment Additionally, reference is made in file to physical therapy, strengthening and aquatic therapy, but the file does not include complete records of these treatments for our review.

In summary, there is a lack of documentation regarding the history, objective test results physical examination results, and the results of all treatment and therapy. The evidence in file does not provide a complete, comprehensive history of all medical records for the conditions you claim to support the conclusion that your conditions prevent you from attending the workplace altogether or prevent you from performing useful and efficient service in your position, for a period of one year or more.

DECISION

In view of the above, we have again concluded that documentation presented does not show that you meet the eligibility requirements specified under current law and regulation. Therefore, we have sustained the original decision to disallow your application.

For the above stated reasons, we must affirm the disallowance decision previously issued.

You have the right to appeal this decision to the Merit Systems Protection Board (MSPB). If you wish to exorcise this right, please note that the time limit to file an appeal in the enclosed package is incorrect. An appeal must be filed within 30 calendar days after the date of this decision, or 30 days after receipt of this decision, whichever is later. The address of the MSPB office is:

Merit Systems Protection Board

Western Regional Office

250 .Montgomery Street, Suite 400

San Francisco California 94104-3401

APPENDIX B
August 14, 2001, Initial Decision of ALJ in Allen v
OPM Docket No. SF-844E-01-0326-1-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

ETHAN E. ALLEN,
Appellant,
V.
OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 8 140 644)
DATE: August 14, 2001
DOCKET NUMBER SF-844E-01-0326-1-1

Ethan E. Allen, Pt. Richmond, California, Pro Se.
Thomas Styer. Washington, D.C., for the agency.

BEFORE
LuNell C. Anderson
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the March 15, 2001 reconsideration decision by the Office of Personnel Management (OPM) denying his application for disability retirement under the Federal Employees' Retirement System (FERS). The Board has jurisdiction over the

appeal. See 5 U.S.C. § 8451 (a)(2)(C) and 7101(a). A hearing was held on June 21, 2001.

For the reasons set forth below, OPM 's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant, who is thirty-six years of age, was formerly employed as a Computer Scientist, GS- 1550-12, by the Department of the Navy. In a notice dated July 29, 1999, the appellant was advised that he had been reached for reduction-in-force (RIF) and would be separated effective November 30. 1999. The appellant continued to work at the agency up until the date of his separation by RIF.

The record shows that the appellant was involved in an automobile accident an December 22, 1995. The appellant complained of and was treated for pain in his neck, back, knees and ankles. M.K. Portnoff, M.D., reported on December 26, 1995, that the x-rays taken of the spine cervical and four views of the ankle did not reveal any remarkable injuries. The appellant continued to complain of pain arid was treated with Motrin and physical therapy. The appellant was also seen by a chiropractor, Mark Dulberg, D.C., and later by Bruce Del Fante. D.C. The appellant was absent from work for 2 weeks after the accident and intermittently thereafter until he returned to work full time on March 17, 1996. The appellant used a combination of sick and annual leave and leave without pay for time off work for a water therapy program by the Arthritis Foundation at the YMCA, visits to the chiropractor, pain management and medical appointments.

On November 24, 1997, the appellant under went a magnetic resonance imaging (MRI) of the cervical spine and left knee. The report by D.G. Jung, M.D., indicated that the medial and lateral collateral ligaments appeared

normal, that normal signal was seen in the bones, that in the cervical spine there was a slight right sided posterior disc protrusion and/or spondylosis seen at C5-6, and the left knee was negative.

On March 13, 1998, Terrance Brawn, M.D., performed arthroscopic surgery for a large medial synovial plica in the appellant's left knee - There were no other complications noted, However, the appellant continued to complain of knee pain subsequent to the surgery.

On October 30, 1999, the appellant completed the Applicant's Statement of Disability. He described his disabilities as chronic pain, pain in the knee, neck and back, and headaches. He stated that he became disabled in December 1995, and that at times his headaches impaired his ability to work and to concentrate. The appellant further stated that at times he arrived late to work or left early due to his pain and he took time off every week for water therapy. Finally, the appellant noted that sitting for extended periods, typing and driving exacerbated his pain- The appellant also stated that he requested, as an accommodation, leave without pay for an indefinite period of time to attend water therapy but the agency denied his request. The appellant acknowledged however that the agency did extend to him other accommodations to include a maxiflex schedule, an oversized computer monitor to minimize neck fatigue, an ergonomic keyboard and chair, and liberal leave usage.

The Supervisor's statement for the appellant's application was completed by Walter Hoffman on October I5, 1999. Mr. Hoffman certified that the appellant continued to work at the agency until his separation by RIF, that his attendance was acceptable and that his absences had no impact on the operation. Mr. Hoffman indicated that a part-time position was discussed with the appellant in early 1999 after the appellant's request for 12 hours of leave without pay per week for an indefinite time

period was denied. However, the appellant never requested a part time position. Finally, Mr. Hoffman indicated that the appellant's performance appraisals all showed his performance at an acceptable level and that he received his scheduled within grade increases.

OPM denied the appellant's application for disability retirement in an initial decision and upon reconsideration. OPM found that the appellant had failed to establish that his medical condition prevented him from performing the critical duties of his position. The appellant subsequently appealed OPM's reconsideration decision to the Board.

Applicable Law

As the applicant for retirement benefits, the appellant bears the burden of proving his entitlement to such benefits by preponderant evidence. 5 C.F.R. § 1201.56(a)(2); *Cheeseman v. Office of Personnel Management,* 791 F.2d 138, 140-41 (Fed. Cir 1986), *cert denied,* 479 U.S. 1037 (1987)[1]. To meet this burden, an employee claiming entitlement to disability retirement benefits under FERS must meet the following requirements: (1) you must have completed I8 months of creditable civilian service; (2) while employed in a position subject to FERS, you became disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition must either prevent you from performing useful and efficient service, or prevent you from remaining in the position; (3) the disabling medical condition must be expected to continue for at least one year from the date you filed your application for disability; (4) it would be unreasonable to

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[1] Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find hat a disputed fact is more likely true than untrue. 5 C F.R § 1201.56(c)(2).

expect the agency to "accommodate" your disabling medical condition in your current position; and (5) you must not have declined a reasonable offer of reassignment to a vacant position at your same grade or pay level. An "accommodation" is defined as a vacant position at your same grade or pay level that you could have performed despite your medical condition, or a change in the duties of your present job that would allow you to continue working despite your medical condition. *See* 5 U.S.C. § 8451 and 5 C.F.R. § 844.103(a).

The ultimate determination of disability is based upon the probative value of all the evidence, taking into account: (1) objective clinical findings; (2) diagnoses and medical opinions; (3) subjective evidence of pain and disability; and (4) all evidence relating to the effect of the employee's condition on his ability to perform in the position last occupied. *Faragon v. Office of Personnel Management,* 51 M.S.P.R. 63, 68(1991).

Appellant's Evidence of Disability

It is undisputed that the appellant has completed 18 months of creditable service and that he applied for disability retirement within one year after his separation from Federal service. The evidence of record established that the appellant was involved in an automobile accident that occurred on December 22, 1995. He was seen at Kaiser in Martinez the same day. Dr. Portnoff, the treating physician, reported no significant abnormal findings in the cervical spine and ankle x-rays taken that day. The appellant was next seen at Kaiser on January 4, 1996 for left knee pain and an x-ray was taken. The results reported by P. Stevens, M.D. indicated no significant abnormal findings. The appellant saw a chiropractor on January 12, 15, and 17, 1996, for neck and knee pain and again in February. The notes taken at these visits indicated that the appellant had symptoms of lower back pain, intermittent and moderate right ankle pain and weak bilateral knee pain with more in the left. The notes from Dr. Dulberg also indicated that the appellant was rear-ended in 1991

and he suffered neck and lower back pain and was not better for six months.

The appellant was seen at Kaiser in February and April of 1996 with complaints of body pain. He was given a physical therapy referral on April 30, 1996 and was seen on May 10. 1996. During this time period the appellant was prescribed Motrin for the pain. The appellant also saw Dr. Del Fante for 12 chiropractic treatments beginning in February 1996 through September 1997.

In support of his application for disability retirement, the appellant submitted a letter dated February 16, 2000, from John T. Malone, M.D., his treating physician. Dr. Malone reported that the appellant was seen and evaluated in a chronic pain management program and that the appellant reported that he had some moderate reduction in his chronic pain since becoming unemployed when he was able to cut down on his driving. Dr. Malone also made reference to his earlier report dated November 11, 1998. The chronic pain management team's care plan recommendations dated October 8, 1999 included, outpatient physical therapy, level II pain self-management class, consideration of cervical epidural steroid instillation, chiropractic care, acupuncture therapy and minimize caffeine intake. However, there is no documentation in the record to show the outcome of the recommended course of treatment with the exception of the chiropractic care.

The appellant also presented subjective evidence of disability due to pain. During the hearing in this appeal, he described the pain to his neck, back and left knee pain as constant and stated that he often suffered from headaches. The appellant further stated that he sought relief with water therapy, saw a chiropractor and took Motrin for the pain. However, he testified that the therapy treatments and medication did not always relieve the pain.

At the hearing, the appellant explained that when he applied for disability retirement, he had to weigh the possibility of being placed through the Priority Placement Program against the possibility of collecting disability retirement payments. He stated that considering his attendance record and the lack of maxiflex schedules at other facilities, he felt his best option was to apply for disability retirement. The appellant acknowledged that he was able to perform all the duties of his position but argued that because he attended water therapy three times a week, this absence from the work place made him unable to perform useful and efficient service. Still, the record established, through the supervisor's statement and the appellant's performance evaluations, that there was never a documented service deficiency in any of the critical elements of his position. In fact, his supervisor described the appellant as a person with "extraordinary talent."

Ingrid Fields, Supervisory Computer Scientist for Naval Surface Workers Center, Indian Head Division, Detachment Concord, and the appellant's supervisor testified that the appellant fully performed the duties of his position and he would have continued in the position if he had not been separated by a RIF. Ms. Fields stated that the appellant had good skills, worked well with his co-workers, and that his performance at all times was satisfactory. Finally, Ms. Fields stated that the appellant, or anyone on his behalf, never requested an accommodation other than a key for the elevator that he was provided.

<u>The appellant has failed to establish entitlement to a disability retirement annuity.</u>

Based on a careful review of the evidentiary record, I find that the appellant has failed to show by preponderant evidence that he is entitled to a disability retirement annuity. Although he has established that he experienced pain in the neck, back and left knee, I find

that he has not shown by preponderant evidence that his medical condition rendered him disabled for useful and efficient service in his former position as a Computer Scientist. See *Maggard* V. *Office of Personnel Management,* 10 M.S.P.R. 424, 425 (1982) (though evidence supported a finding that the appellant suffered from pain due to a medical problem, it did not support a finding that he was totally disabled from his position). Further, the medical reports of record did not indicate that the appellant was unable to perform in his position. *Givens v. Office of Personnel Management,* 21 M.S.P.R. 627, 628 (1984).

I also find no evidence of a service deficiency prior to the appellant's separation by RIF. At the time of the appellant's separation, Mr. Hoffman, his supervisor, certified that the appellant's performance was satisfactory and the appellant's last performance appraisal of record for the calendar year 1998, was satisfactory. Although the record shows that the appellant was absent from the workplace to attend his water therapy class and intermittently for medical appointments or to see his chiropractor, the agency accommodated the appellant by allowing him to work a maxiflex schedule or liberal use of leave. Further, the appellant's supervisor certified that his attendance was acceptable for continuing in his current position.

I find that the appellant has failed to establish that his medical condition prevented him from performing useful and efficient service in his Computer Scientist position. The appellant never identified any official duty that he was prevented from performing because of his medical condition. Moreover, while the appellant maintained that his medical condition made it difficult to commute to work, the Board has found that difficulty commuting is not a relevant consideration in a disability retirement determination. *See Livengood v. Office of Personnel Management.* 41 M.S.P.R. 568, 574 (1989); *Jolliffe v. Office of Personnel Management,* 23 M.S.P.R. 188, 191 (1984) *aff'd* 785 F.2d 320 (Fed. Cir. 1985)

(Table). The relevant consideration is whether the appellant can perform the duties of his position. The record shows and I find that subsequent to his accident in 1995, the appellant continued to perform the duties of his position and to perform useful and efficient service in his position as a Computer Scientist.

Accordingly, I conclude that the appellant has failed to establish by preponderant evidence that he is eligible for a disability retirement under FERS.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD:

"s/LuNell C. Anderson"

LuNell C. Anderson

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on September 18, 2001, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These

instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board

Merit Systems Protection Board

1615 M Street, NW.,

Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals

for the Federal Circuit

711 Madison Place, NW.

Washington, DC 20439

You may not file your petition with the court be fore this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C
April 30, 2002, MSPB Final Order in
Allen v. Office of Personnel Management,
DOCKET No- SF-844E-01-0326-I-1

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ETHAN E. ALLEN,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

(CSA 8 140 644)

DOCKET NUMBER SF-844E-01-0326-I-1

DATE: APR 30 2002

Ethan E. Allen, Pt. Richmond, California, Pro Se.

Thomas Styer, Washington, D.C., for the agency.

BEFORE

Susanne L. Marshall, Acting Chairman

Beth S. Slavet. Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the

administrative judge. We grant petitions such as this is one only when significant new evidence is presented to us that at was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations section 1201.115(5 C.F.R. 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence that the administrative judge made no error in law or regulation that affects the outcome 5 C.F.R. § 1201.11 5(d). Therefore we DENY the petition for review The initial decision of the administrative judge is final. This is the Boards foal decision in this matter. 5 C.F.R § 1201.113

NOTICE T0 THE APPELLANT REGARDING

YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N-W. Washington, DC: 20439

The court must receive your request for review no then than 60 calendar days after your receipt of this order. If you have a representative in thi case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar lays after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be he dismissed. See *Pinat v. Office of Personnel Management,* 93 F.2d 541 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of he United Stales Code, section, 7703 (5 U.S.C § 7703). You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

"s/McCarthy"

Shannon McCarthy

Acting Clerk of the Board

Washington, D.C.

APPENDIX D
Oct 17, 2002 ORDER of the Fed Cir in
***ALLEN v OPM* 02-3295**

NOTE: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

02 –3295

ETHAN E. ALLEN Petitioner, v OFFICE OF PERSONNEL MANAGEMENT, Respondent.

ON MOTION

Before DYK. Circuit Judge

ORDER

The Office of Personnel Management (OPM) moves to remand this case to the Merit Systems Protection Board for further consideration. Ethan E. Allen consents.

OPM states that the Board neglected to consider certain issues. In view thereof, the court is willing to remand to the Board to allow the parties to ask the Board to conduct further proceedings. However, the Board may proceed as it wishes and, if it declines to reconsider its decision, it should re-enter a final decision from which Allen may file a petition for review in this court.

Accordingly.

IT IS ORDERED THAT,

The motion is granted.

Oct 16, 2002

Date

"s/Chury BR."

Timothy B. Dyk

Circuit Judge

Issued as Mandate: Oct 17 2002.

FILED U.S. COURT OF APPEALS FOR THE
FEDERAL CIRCUIT OCT 17 2002 JAN
HORBALLY CLERK

APPENDIX E
Sept 30, 2003, MSPB FINAL ORDER in
***ALLEN v OPM* DOCKET No SF-844E-01-0326-M-l**

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ETHAN E. ALLEN, Appellant, v OFFICE OF PERSONNEL MANAGEMENT, Agency.

(CSA 8 140 644)

DOCKET NUMBER SF-844E-01-0326-M-l

DATE: SEP 30 2003

Ethan E. Allen, Point Richmond, California Pro Se,

Thomas Styer, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman

Neil A. G. McPhie, Member

FINAL ORDER

The appellant filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. *Allen v. Office of Personnel Management,* MSPB Docket No. SF-844E-01-0326-1-l (Initial Decision, Aug. 14, 2001). We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title *5* of

the Code of Federal Regulations, section 1201 115 (5 C.F.R. § 1201.115). The Board denied the appellant's petition for review of the initial decision that affirmed the Office of Personnel Management's (OPM's) denial of his application for a disability retirement, whereupon he filed a petition with the U.S. Court of Appeals for the Federal Circuit. OPM filed an Unopposed Motion for Remand, asking the court to remand the case to the Board to consider three issues. In its brief Order granting the motion, the court directed the Board to "proceed as it wishes." *Allen v. Office of Personnel Management,* No. 02-3295 (Fed. Cir. Oct. 17, 2002). We issued an order directing the parties to provide argument on the issues raised by OPM in its motion for remand. We have received responses from both parties and have taken them into consideration in our decision.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we decline to reconsider our earlier decision to DENY the petition for review. The initial decision of the administrative judge is final. This is the Boards final decision in this matter. 5 C.F.R. § 1201,113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinai v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb. gov.

FOR THE BOARD: .

"s/Mathew Shaman"

Bentley M. Roberts, Jr.

Clerk of the Board

Washington, D.C.

APPENDIX F
April 9, 2004, Decision of Federal Circuit in
***Allen v OPM* 04-3077**

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-3077

ETHAN E. ALLEN, Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: April 9, 2004

Before CLEVENGER, SCHALL, and BRYSON, Circuit Judges. PER CIJRIAM.

DECISION

Ethan E. Allen petitions for review of the final decision of the Merit Systems Protection Board ("Board") that sustained the reconsideration decision of the Office of Personnel Management ("OPM") denying his application for disability retirement. Allen v Office of Pers. Mgmt., No. SF-844E-01-0326-M-1 (M.S.P.B. Sep. 30, 2003). We dismiss for lack of jurisdiction.

DISCUSSION

I.

Mr. Allen timely appealed to the Board from OPM's reconsideration decision denying his application for disability retirement benefits.

Following a hearing, the administrative judge ('AJ') to whom the appeal was assigned issued an initial decision affirming OPM's decision. Allen v. Office of Pers. Mgmt., No. SF-844E-01-0326-M-1 (M.S.P.B. Aug 14, 2001). In her initial decision, the AJ determined that although Mr. Allen had established that he experienced pain in his neck, back, and left knee, he had failed to show that his medical condition rendered him disabled for useful and efficient service in his former position as a computer scientist at the Department of the Navy's Naval Weapons Center in Concord, California. The AJ's initial decision became the final decision of the Board on April 30. 2002 after the Board denied Mr. Allen's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. Allen v. Office of Pers. Mgmt, No-SF-844E-01-0326-I-1 (M.S.P.B. Apr. 30, 2002).

Mr. Allen appealed the Board's decision to this court. Upon motion of the government, the case was remanded to the Board for it to consider whether there were problems with Mr. Allen's attendance at work which would constitute a work deficiency and thus support his application for disability retirement. On September 30, 2003, after considering the findings in the case, the Board declined to reconsider its April 30, 2002, decision denying Mr. Allen's petition for review. The AJ's initial decision thus remained the final decision of the Board. Mr. Allen now appeals to us again.

II.

Pursuant to 5 U.S.C. § 8461(d), OPM is charged with making disability determinations concerning federal civilian employees. Section 8461(d) provides in relevant part that, except for an appeal to the board—see 5 U.S.C. § 8461 (e)(l)—such determinations by OPM are "final and conclusive and are not subject to review." Under this statutory scheme, the Board's factual findings with respect to Mr. Allen's disability claim are not subject to our review. We may only review whether there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some

like error going to the heart of the administrative determination. Anthony v. Office of Pers. Mgmt., 58 F.3d 620, 626 (Fed. Cir, 1995) (quoting Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 791 (1985).

On appeal, Mr. Allen argues that the Board erred in its factual findings when it determined that he had failed to establish that he was disabled under applicable statutes and regulations. Lindahl and Anthony make clear that this is precisely the sort of claim that we have no authority to consider- Under these circumstances, we have no alternative but to dismiss the appeal for lack of jurisdiction. Mr. Allen's appeal is therefore dismissed.

Each party shall bear its own costs.

APPENDIX G
5 U.S.C. § 8461

Sec. 8461. Authority of the Office of Personnel Management

(a) The Office shall pay all benefits that are payable under subchapter II, IV, V, or VI of this chapter from the Fund.

(b) The Office shall administer all provisions of this chapter not specifically required to be administered by the Board, the Executive Director, the Secretary of Labor, or any other officer or agency.

(c) The Office shall adjudicate all claims under the provisions of this chapter administered by the Office.

(d) The Office shall determine questions of disability and dependency arising under the provisions of this chapter administered by the Office. Except to the extent provided under subsection (e), the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under the provisions of this chapter administered by the Office. The Office may suspend or deny annuity for failure to submit to examination.

(e)(1) Subject to paragraph (2), an administrative action or order affecting the rights or interests of an individual or of the United States under the provisions of this chapter administered by the Office may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for

purposes of disability retirement under section 8451, the procedures under section 7701 shall apply and the decision of the Board shall be subject to judicial review under section 7703.

(f) The Office shall fix the fees for examinations made under subchapter V of this chapter by physicians or surgeons who are not medical officers of the United States. The fees and reasonable traveling and other expenses incurred in connection with the examinations are paid from appropriations for the cost of administering the provisions of this chapter administered by the Office.

(g) The Office may prescribe regulations to carry out the provisions of this chapter administered by the Office.

(h)(1) Each Government agency shall furnish the Director with such information as the Director determines necessary in order to administer this chapter.

(2) The Director, in consultation with the officials from whom such information is requested, shall establish (by regulation or otherwise) such safeguards as are necessary to ensure that information made available under this subsection is used only for the purpose authorized.

(i) In making a determination of ``actuarial equivalence'' under this chapter, the economic assumptions used shall be the same as the economic assumptions most recently used by the Office (before the determination of actuarial equivalence involved) in determining the normal-cost percentage of the System.

(j)(1) Notwithstanding any other provision of this chapter, the Director of Central Intelligence shall, in a manner consistent with the administration of this chapter by the Office, and to the extent considered appropriate by the Director of Central Intelligence--

(A) determine entitlement to benefits under this chapter based on the service of employees of the Central Intelligence Agency;

(B) maintain records relating to the service of such employees;

(C) compute benefits under this chapter based on the service of such employees;

(D) collect deposits to the Fund made by such employees, their spouses, their former spouses, and their survivors;

(E) authorize and direct disbursements from the Fund to the extent based on service of such employees; and

(F) perform such other functions under this chapter (other than under subchapters III and VII of this chapter) with respect to employees of the Central Intelligence Agency as the Director of Central Intelligence, in consultation with the Director of the Office of Personnel Management, determines to be appropriate.

(2) The Director of the Office of Personnel Management shall furnish such information and, on a reimbursable basis, such services to the Director of Central Intelligence as the Director of Central Intelligence requests to carry out paragraph (1).

(k)(1) The Director of Central Intelligence, in consultation with the Executive Director of the Federal Retirement Thrift Investment Board, may--

(A) maintain exclusive records relating to elections, contributions, and accounts under the Thrift Savings Plan provided in subchapter III of this chapter in the case of employees of the Central Intelligence Agency;

(B) provide that contributions by, or on behalf of, such employees to the Thrift Savings Plan be accounted for by such Executive Director in aggregate amounts;

(C) make the necessary disbursements from, and the necessary allocations of earnings, losses, and charges to, individual accounts of such employees under the Thrift Savings Plan; and (D) perform such other functions under subchapters III and VII of

this chapter (but not including investing sums in the Thrift Savings Fund) with respect to employees of the Central Intelligence Agency as the Director of Central Intelligence, in consultation with the Executive Director of the Federal Retirement Thrift Investment Board, determines to be appropriate.

(2) The Executive Director of the Federal Retirement Thrift Investment Board may not exercise authority under this chapter in the case of employees of the Central Intelligence Agency to the extent that the Director of Central Intelligence exercises authority provided in paragraph (1).

(3) The Executive Director of the Federal Retirement Thrift Investment Board shall furnish such information and, on a reimbursable basis, such services to the Director of Central Intelligence as the Director of Central Intelligence determines necessary to carry out this subsection.

(l) Subsection (h)(1), and sections 8439(b) and 8474(c)(4), shall be applied with respect to information relating to employees of the Central Intelligence Agency in a manner that protects intelligence sources, methods, and activities.

(m)(1) The Director of Central Intelligence, in consultation with the Director of the Office of Personnel Management and the Executive Director of the Federal Retirement Thrift Investment Board, shall by regulation prescribe appropriate procedures to carry out subsections (j), (k), and (l).

(2) The regulations shall provide procedures for the Director of the Office of Personnel Management to inspect and audit disbursements from the Fund under this chapter.

(3) The Director of Central Intelligence shall submit the regulations prescribed under paragraph (1) to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives before the regulations take effect.

(n)(1) Under regulations prescribed by the Office, an employee who--

(A) has not previously made an election under this subsection or had an opportunity to make an election under this paragraph; and

(B) moves, without a break in service of more than 1 year, to employment in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, respectively, described in section 2105(c),

shall be given the opportunity to elect irrevocably, within 30 days after such move, to remain covered as an employee under this chapter during any employment described in section 2105(c) after such move.

(2) Under regulations prescribed by the Office, an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard described in section 2105(c), who--

(A) has not previously made an election under this subsection or had an opportunity to make an election under this paragraph;

(B) is a participant in a retirement system established for employees described in section 2105(c);

(C) moves, without a break in service of more than 1 year, to a position that is not described by section 2105(c); and

(D) is not eligible to make an election under section 8347(q), shall be given the opportunity to elect irrevocably, within 30 days after such move, to remain covered, during any subsequent employment as an employee as defined by section 2105(a) or section 2105(c), by the retirement system applicable to such employee's current or most recent employment described by section 2105(c) rather than be subject to this chapter.

(Added Pub. L. 99-335, title I, Sec. 101(a), June 6, 1986, 100 Stat. 570; amended Pub. L. 99-556, title I,

Sec. 102, Oct. 27, 1986, 100 Stat. 3131; Pub. L. 101-508, title VII, Sec. 7202(k)(2), Nov. 5, 1990, 104 Stat. 1388-339; Pub. L. 102-378, Sec. 2(71), Oct. 2, 1992, 106 Stat. 1355; Pub. L. 104-106, div. A, title X, Sec. 1043(a)(2), Feb. 10, 1996, 110 Stat. 434; Pub. L. 107-107, div. A, title XI, Sec. 1131(b), Dec. 28, 2001, 115 Stat. 1242.)

Amendments

2001--Subsec. (n)(1). Pub. L. 107-107, Sec. 1131(b)(1), inserted ``and" at end of subpar. (A), redesignated subpar. (C) as (B), and struck out former subpar. (B) which read as follows: ``has 5 or more years of civilian service creditable under this chapter; and". Subsec. (n)(2)(B). Pub. L. 107-107, Sec. 1131(b)(2), struck out ``vested" before ``participant in a retirement system" and struck out ``, as the term `vested participant' is defined by such system" before semicolon at end.

1996--Subsec. (n)(1). Pub. L. 104-106, Sec. 1043(a)(2)(A), struck out ``of the Department of Defense or the Coast Guard" after ``an employee" in introductory provisions and substituted ``1 year" for ``3 days" in subpar. (C).

Subsec. (n)(2)(C). Pub. L. 104-106, Sec. 1043(a)(2)(B), substituted ``1 year" for ``3 days" and struck out ``in the Department of Defense or the Coast Guard, respectively," after ``to a position".

1992--Subsec. (n)(1)(A), (2)(A). Pub. L. 102-378, Sec. 2(71)(A), amended subpars. (A) generally. Prior to amendment, subpars. (A) read as follows: ``has not previously made or had an opportunity to make an election under this subsection;".

Subsec. (n)(2)(D). Pub. L. 102-378, Sec. 2(71)(B), substituted ``8347(q)" for ``8347(p)".

1990--Subsec. (n). Pub. L. 101-508 added subsec. (n).

1986--Subsec. (m)(2). Pub. L. 99-556 struck out ``, and from the Thrift Savings Fund," after ``from the Fund".

Effective Date of 1996 Amendment

For effective date of amendments by Pub. L. 104-106, see Regulations; Effective Date of 1996 Amendment note below.

Effective Date of 1992 Amendment

Amendment by Pub. L. 102-378 effective Nov. 5, 1990, see section 9(b)(6) of Pub. L. 102-378, set out as a note under section 6303 of this title.

Effective Date of 1990 Amendment

Amendment by Pub. L. 101-508 applicable with respect to any individual who, on or after Jan. 1, 1987, moves from employment in nonappropriated fund instrumentality of Department of Defense or Coast Guard, that is described in section 2105(c) of this title, to employment in Department or Coast Guard, that is not described in section 2105(c), or who moves from employment in Department or Coast Guard, that is not described in section 2105(c), to employment in nonappropriated fund instrumentality of Department or Coast Guard, that is described in section 2105(c), see section 7202(m)(1) of Pub. L. 101-508, set out as a note under section 2105 of this title.

Regulations; Effective Date of 1996 Amendment

For provisions relating to promulgation of regulations necessary to carry out amendment by Pub. L. 104-106, and effective date of such amendment in connection with those regulations, see section 1043(b), (c) of Pub. L. 104-106, set out as a note under section 8347 of this title.

Treatment of Individuals Electing To Remain Subject to Their Former Retirement System

For provisions relating to the deductions and contributions required with respect to individuals electing under section 8347(q) or 8461(n) of this title to remain covered under subchapter III of chapter 83 of this title, chapter 84 of this title, or a retirement system for employees described in section 2105(c) of

this title, see section 7202(n) of Pub. L. 101-508, set out as a note under section 2105 of this title.

APPENDIX H
5 C.F.R. 1201.115

TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER II--MERIT SYSTEMS PROTECTION BOARD

PART 1201_PRACTICES AND PROCEDURES--Table of Contents

Subpart C_Petitions for Review of Initial Decisions

Sec. 1201.115 Contents of petition for review.

(a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

(b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(2) If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(c) Nothing in paragraph (b) of this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.

(d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record closed; or

(2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 30863, June 16, 1994; 62 FR 43631, Aug. 15, 1997; 64 FR 27900, May 24, 1999]

APPENDIX I
5 C.F.R. 844.103

5 C.F.R. 844.103 Eligibility

(a) Except as provided in paragraph (c) of this section, an individual must meet the following requirements in order to receive a disability annuity:

(1) The individual must have completed at least 18 months of civilian service that is creditable under FERS, as defined in Sec. 842.304 of this chapter;

(2) The individual must, while employed in a position subject to FERS, have become disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position;

(3) The disabling medical condition must be expected to continue for at least 1 year from the date the application for disability retirement is filed;

(4) Accommodation of the disabling medical condition in the position held must be unreasonable; and

(5) The individual must not have declined an offer of reassignment to a vacant position.

(b) The employing agency must consider a disability applicant for reassignment to any vacant position. The agency must certify to the Office of Personnel Management (OPM) either that there is no vacant position or that, although it made no offer of reassignment, it considered the individual for a vacant position. If an agency offers a reassignment and the individual declines the offer, the individual may appeal the agency's determination that the individual is not disabled for the position in question to the Merit Systems Protection Board under 5 U.S.C. 7701.

(c)(1) Paragraphs (a)(2) through (a)(4) of this section do not apply to a military reserve technician who retires under 5 U.S.C. 8456.

(2) An individual who separates from employment as a military reserve technician under circumstances set forth in 5 U.S.C. 8456(a)(1) after reaching age 50 and completing 25 years of service is not entitled to a disability annuity under this part, but is entitled to an annuity under Sec. 842.210 of this chapter.

(3) A former military reserve technician is not entitled to an annuity under 5 U.S.C. 8456 based on service as a technician if the technician is subsequently appointed to another position in the Federal Government.

APPENDIX J
August 20, 2002, RESPONDENT'S UNOSPOSED MOTION FOR REMAND to the FEDERAL CIRCUIT
in *Allen v OPM* 02-3295

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-3295

Ethan E. Allen, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondent.

RESPONDENT'S UNOSPOSED MOTION FOR REMAND

Respondent, the Office of personnel Management ('OPM") respectfully requests that the Court remand this case to the Merit Systems Protection Board ('MSPB' or "board") for further consideration. Mr. Allen has authorized us to state that he does not oppose this motion for remand,

There are important issues presented by this case that are not directly addressed view, it would be appropriate for the board to address these matters directly and fully prior to any review by this Court. Such further consideration by the hoard is in the interests of justice and judicial economy. Mr. Allen has authorized us to state that he favors such further review by the board. The central issue in this case is whether Mr. Alien has demonstrated entitlement to disability retirement benefits. In the proceedings before the board, Mr. Allen alleged that injuries received in an automobile accident, had rendered

him unable to work a full 40 hour work week during a period of four years. It is undisputed that Mr. Alien could perform his work duties when he was at work.

Injuries that cause deficiencies in attendance satisfy the statutory and regulatory definition of disability, for the purposes of evaluating a claim for disability retirement benefits. 5 U.S.C. 8451(a) (1) (B) ('because of disease or injury, to render useful and efficient service in the employee's position"); 5 C.F.R. 5 844.102 (definitions of 'disability' and 'useful and efficient service'); 5 C.F.R. § 814.103(a) (7-) ' ... resulting in a deficiency in performance, conduct, or attendance") (eligibility requirements) (emphasis added)

In this case, Mr. Allen alleged that he was disabled because his injuries had rendered him unable to work the 40 hour work week (described in his official job description) for a period of four years, and because he reasonably anticipated that the deficiency in his ability to meet attendance requirements would continue for more than a year into the future.

Mr. Allen has admitted that the agency had accommodated his attendance deficiency during the past four years, but Mr. Allen has alleged that he had been informed that the accommodation was only temporary. By law, a temporary accommodation does not vitiate a demonstration of entitlement to disability retirement benefits. Gometz v. OPM, 69 M. S,P.R, 115, 123 (1995) (temporary accommodation does not alter entitlement); Malan v. Department Of Air Force, 55 M.S.P.R. 283, *295* (1992) (indirect evidence that accommodation is temporary satisfies employee's burden of proof); see Marino V. OPM, 243 F.3d 1375, 1377 (Fed. Cir, 2001) (alleged accommodation does not affect eligibility where employee demonstrates that he cannot meet requirements in official position description)

We seek a remand to the MSPB in order for the board to directly address three issues:

(1) What is the legal standard for determining when attendance problems constitute a deficiency?

(2) Did Mr. Allen demonstrate a deficiency in attendance?

(3) If there was a deficiency, was the agency's accommodation of that deficiency temporary or permanent?

The final decision of the board does not directly address these issues.

The final decision finds that Mr. Allen was absent from work as a result of his injuries. The final decision also finds that the agency accommodated these attendance problems:

> Although the record shows that the appellant was absent from the workplace to attend his water therapy class and intermittently for medical appointments or to see his chiropractor, tire agency accommodated the appellant by allowing him to work a maxiflex schedule or liberal use of leave,

A8 (final decision) (emphasis added)[1].' The reference to the agency's accommodations might be construed to imply that there was an attendance deficiency. However, in another portion of the decision, the board made a

---

[1] "A" refers to the appendix to this motion.

general finding that there was "no evidence of a service deficiency." A7.

In any event, the final decision does not articulate the legal criteria for determining when attendance problems rise to the level of a deficiency. Furthermore, the final decision makes no specific finding concerning whether Mr. Allen's attendance problems constituted a service deficiency.

Instead, the final decision focuses upon the quality of Mr. Allen's work. It appears that the board may have found that there was no service deficiency because Mr. Allen was able to perform his job when he was in attendance. A7-8. If that was the board's finding, then the finding is incomplete; the principal basis of Mr. Allen's claim for disability retirement was his attendance problem — not an inability to perform required tasks.

We respectfully request that the Court remand this case to the MSPB for its consideration of the proper legal standard for determining when attendance problems constitute a deficiency, for its consideration of whether Mr. Allen demonstrated a deficiency in attendance, and, if necessary, for consideration of whether the accommodations by the Navy were temporary or permanent.[2].

---

[2] Mr. Allen presented to the board documentary evidence that the agency had refused to accommodate his attendance problems on a permanent basis:

> As I mentioned before, my concern with this situation is that Ethan may be trying to work a part time schedule filling the not-worked hours with a combination of sick leave, annual leave and LWOP [leave without pay]. This is not acceptable.

For the reasons set forth above, we respectfully request that the Court grant our unopposed motion to remand this case to the MSPB for further consideration.

Respectfully submitted,

ROBERT B. McCALLUM JR.
Assistant Attorney General

DAVID M. COHEN
Director

's/Deborah A Bynum'
BEBORAH A BYNUM
Assistant Director

's/James W Poirier'
James W. POIRIER
Attorney

. . .Please look into this situation from a long term view and provide the information requested so that we can make the appropriate decision if that becomes necessary.

A12 (emphasis added) . The final decision did not directly address this evidence. Furthermore, the board denied Mr. Allen's request to call the author of this document as a witness at the hearing.

Commercial litigation Branch
Civil Division
Deparment of Justice
Attn: Clasification Unit
8th Floor, 1100 L St. NW
Washington D.C. 20530
Tele: (2O2) 307 – 6289
Fax: (202) 514:7969

Attorneys for Respondent
August 20, 2002

APPENDIX K
February 26, 2002 OPINION AND ORDER of the MSPB in Combs v SSA Docket Number SF-0752-00-0107-I-3

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRENDA J. COMBS,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Agency.

DOCKET NUMBER SF-0752-00-0107-I-3

DATE: February 26, 2002

Cindi Fox, Esquire, Law Offices of David S. Handsher, San Francisco, California, for the appellant.

Wendy Driver-Guinn, Esquire, San Francisco, California, for the agency.

BEFORE

Susanne T. Marshall, Acting Chairman
Beth S. Slavet, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision that sustained her removal from Federal service. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1210.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the

appellant's removal.

BACKGROUND

1. The appellant has cerebral palsy. The State of California Department of Vocational Rehabilitation referred her to the agency for employment. In 1981, the agency appointed her under Schedule A, to a full-time GS-3 Clerk Typist (Secretary) position, assigned to Module 4 in its Richmond, California office. Initial Appeal File (IAF)-1, Tab 4, Subtab 4y. The position description for the position lists the critical duties as including: receiving visitors and telephone calls; delivering messages; reviewing and controlling correspondence, reports and transmittals; routing materials to the managers and staff in the Module; maintaining Standard Form (SF)-7B cards; controlling personnel actions; maintaining time and attendance records; and requisitioning office supplies, maintenance requests and printing services. *Id.*, Subtab 4x. The Module 4 Manager was Linda Ng. IAF-1, Tab 4; IAF-2, Tabs 5, 6.

2. Between 1987-1995, the appellant suffered many falls on and off of the job that left her physically injured. IAF-1, Tab 4, Subtab 4d; IAF-2, Tab 5. In March 1996, she sustained multiple injuries after being thrown from an electrical cart. *Id.* After a 5-month absence, the appellant returned to work on August 12, 1996, with recommended medical restrictions from her treating physician, Dr. Kathryn Williams. IAF-1, Tab 4, Subtabs 4e, 4t. The restrictions included: a 4-hour work day for the first month with the remaining 4 hours carried as Office of Workers' Compensation Programs (OWCP)-covered or leave without pay (LWOP); the placement of overhead bins within her reach; a motorized cart from OWCP; the agency's agreement to keep the cart charged; and limitations on her kneeling, standing, bending, twisting, lifting, reaching, walking, and sitting. *Id.* The appellant eventually increased her workday to 5 hours, but on August 23, 1996, she sustained

another on-the-job injury that precluded her from working. IAF-1, Tab 4, Subtabs 4d, 4e; IAF-2, Tab 5.

3. Meanwhile, in November 1996, Margaret Rodriguez, the only other full-time Secretary in Module 4, resigned. IAF-1, Tab 4, Subtabs 4a, 4d. According to the agency, there were no funds to hire a replacement for Rodriguez. *Id.*, Subtab 4a. Therefore, to assist the appellant until she could resume full-time work upon her return to work, Claims Clerk Recovery Examiner Gilda King, from another office, was assigned to Module 4. *Id.*; IAF-2, Tabs 5, 6. On February 26, 1997, the appellant returned to work, with recommended medical restrictions from Dr. J.G. Byrd. IAF-1, Tab 4, Subtabs 4e, 4s. Those restrictions included a 4-hour or 5-hour workday, no lifting, no pushing, pulling, or carrying over 10 pounds, no repetitive bending, no stooping, no climbing, no twisting, and limited standing and walking. *Id.*, Subtab 4s. *2*

4. The appellant returned to work under the supervision of a new Module 4 Manager, Delphinia Slaughter. IAF-2, Tabs 5, 6. One month after her return to work, however, the appellant had not resumed a full-time schedule as a Secretary. IAF-1, Tab 4, Subtab 4e; IAF-2, Tabs 5, 6. Because Slaughter thought the appellant was not performing the critical duties of her position under an abbreviated workday schedule, even with King's help, Slaughter detailed the appellant for 120 days, beginning March 24, 1997, to a Cash Clerk position in the Remittance & Accounting Unit (RAU). IAF-1, Tab 4, Subtab 4r. Under the terms of the detail, the appellant could request a permanent reassignment to the Cash Clerk position at any time. *Id.*

5. The appellant underwent training for the Cash Clerk position, and the RAU supervisor, Gwen McCoy, conducted periodic written and oral reviews of the appellant's performance. IAF-1, Tab 4, Subtabs 4n, 4o, 4p. When the appellant complained of migraine headaches and ringing in

the ears due to loud noises from an inscriber/endorser machine in RAU, McCoy covered the machine and provided the appellant with a headset to cover her ears. *Id.*, Subtabs 4k, 4m. By June 1997, however, McCoy had documented that the appellant had difficulty setting priorities, completing assigned duties, retaining instructions, and maintaining a low error rate when verifying remittance transmittals, despite her reduced work load and assistance from coworkers. *Id.*, Subtabs 4j, 4l. McCoy also noted that the appellant had difficulty keying with her left hand due to carpal tunnel symptoms. *Id.*, Subtab 4f. Later in June 1997, the appellant had an automobile accident and was absent from work for the remainder of her detail. *Id.*, Subtabs 4g, 4h.

6. On August 4, 1997, the appellant returned to work in Module 4, under Dr. Byrd's medical restrictions of a 4-hour work day, no lifting or carrying over 5 pounds, pushing or pulling over 10 pounds, repetitive bending, stooping, or repetitive twisting. *Id.*, Subtab 4h. On August 6, 1997, Slaughter sent a memorandum to Employee Relations Specialist Renee Glazier, stating that arrangements had been made to temporarily assign the appellant to the Health Unit to assist a nurse with clerical work because the appellant's wrist pain prevented her from numericalizing Federal Archive Record Center papers in Module 4. *Id.*, Subtab 4g. Slaughter also stated in the memorandum, that she had received conflicting doctors' notes from the appellant about the duration of her part-time work/medical restrictions and that she told the appellant that an "end-date" for her medical restrictions was needed. *Id.*

7. On August 11, 1997, the appellant was assigned to the Health Unit. IAF-1, Tab 4, Subtab 4d at 6. On August 22, 1997, Slaughter issued the appellant a removal proposal notice, charging her with inability to maintain regular attendance and inability to perform assigned duties for medical

reasons. *Id.* at 1-6. On October 9, 1997, deciding official Lucille Johns issued the appellant a removal decision notice based on the same charges and stating that the appellant would be removed from her Secretary position effective October 10, 1997. IAF-1, Tab 4, Subtabs 4b, 4c. The removal decision notice also apprised the appellant that she was eligible to apply for disability retirement within one year following her separation. *Id.*, Subtab 4c.

8. The appellant filed an equal employment opportunity (EEO) complaint against the agency charging that she was removed because of age and disability discrimination. IAF-1, Tab 4, Subtab 4a. Following the agency's issuance of a final agency decision finding no discrimination, *id.*, the appellant timely filed a Board appeal that was dismissed without prejudice to refiling. IAF-1, Tabs 2, 12. Thereafter, she twice timely refiled that appeal. IAF-2, Tab 1; IAF-3, Tab 1. A hearing followed her second refiled appeal and the administrative judge issued an initial decision that sustained the agency's removal action, finding that she did not prove her claim of disability discrimination. IAF-3, Tab 3.

   The appellant has timely filed a petition for review, to which the agency has responded in opposition.

ANALYSIS

The record supports the agency's charge of inability to maintain regular attendance.

9. The appellant asserts that the charge of inability to maintain regular attendance was not proven because she was on approved leave during her absences, including OWCP-covered leave, and that Slaughter agreed that she had never been absent without leave. Petition for Review File in IAF-3 (PFRF),
   Tab 3 at 1, 9-10. The appellant asserts that Slaughter testified that management never warned the appellant that she could face an adverse action

if she did not work on a regular full-time basis. PFRF, Tab 3 at 11. The appellant asserts that *Rabago v. Department of the Army*, 25 M.S.P.R. 530 (1985), holds that an agency cannot take an adverse action against an employee who utilizes approved leave. PFRF, Tab 1 at 9-10.

10. In *Rabago*, the Board stated that, as a "general rule[,] ... an adverse action cannot be based on an employee's use of approved leave." 25 M.S.P.R. at 533. The Board reiterated, however, an exception to that rule which the Federal Personnel Manual first set forth and the Board first addressed in *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984). Specifically, provided that certain criteria are met, an agency can bring an action against an employee for excessive approved absence. *Rabago*, 25 M.S.P.R. at 533.

11. To take such an action, however, an agency must establish that: (1) The employee was absent for compelling reasons beyond his control so that agency approval or disapproval was immaterial because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis; and (3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. *Id.* Such an action should also be taken only under unusual circumstances, *id.*, i.e., such as when the employee is unable to return to duty because of the continuing effects of illness or injury, *Schultz v. U.S. Navy*, 810 F.2d 1133, 1137 n.* (Fed. Cir. 1987); *Allen v. Department of Army*, 76 M.S.P.R. 564, 570 (1997). Where appropriate, the Board has applied this exception to uphold an agency's adverse action charge of excessive approved absences. *See Allen*, 76 M.S.P.R. at 571; *Gaskins v. Department of the Air Force*, 36 M.S.P.R. 331, 334-35 (1988).

12. Here, in accordance with these authorities, the administrative judge correctly sustained the agency's charge of inability to maintain regular attendance. As the administrative judge found, the record shows that the appellant was absent from work 53.1% of the time from January 1995 through August 15, 1997. Initial Decision (ID) at 3-4; IAF-1, Tab 4, Subtab 4d at 3-4. This absenteeism rate was based on the appellant's leave usage of 242.5 hours of sick leave and 257.5 hours of continuation in pay (COP) in 1995; 19 hours of sick leave, 878.25 hours of LWOP, and 248 hours of COP in 1996; and 492.5 hours of LWOP in 1997. *Id.* The administrative judge noted Slaughter's testimony that: the appellant's absences and part-time work schedule when she was able to work negatively impacted Module 4 because it was staffed with only 1 full-time secretarial position; others had to answer the phones, take inventory and order supplies, and handle time and attendance cards; and the temporary assistance that King provided the appellant caused King to get backlogged in her own non-secretarial work and use overtime. ID at 4, 7; IAF-1, Tab 4, Subtab 4d; IAF-2, Tab 8, Slaughter's Deposition (Dep.) at 23-24; Hearing Tape (HT)-1, Side A.

13. While the appellant asserts that the agency conceded that she was not warned that she could be removed for irregular attendance, a review of Slaughter's testimony does not support this claim. Slaughter testified that, during periodic discussions with the appellant about her unsatisfactory performance, she reminded the appellant of her duties as a Secretary in Module 4. IAF-2, Tab 8, Slaughter Dep. at 21, 24-25; HT-1, Side A. Slaughter testified that each time that the appellant requested a shorter week based on doctors' notes, she "let [the appellant] know that there had to be a stopping point at some point, where she could do the full line of her, the full, full line of her duties." IAF-2, Tab 8, Slaughter Dep. at 25. Notes of a March 13, 1997 meeting involving the appellant,

Slaughter, Glazier, EEO Manager Miguel Castillo, and others, reflect that there was a consensus among the attendees that job alternatives had to be considered for the appellant because her part-time hours and absences prevented her from satisfactorily performing the full-time job of a Secretary. IAF-1, Tab 4, Subtab 4r. Further, Slaughter stated in an August 6, 1997 memorandum to Glazier that Slaughter previously told the appellant to provide her with a doctor's note that set forth an "end-date" for her medical restrictions. *Id.*, Subtab 4g.

This serves as sufficient evidence that the appellant was on notice that her continued part-time work schedule could result in an adverse action. *Cf. Taylor v. Department of Health and Human Services*, 32 M.S.P.R. 342, 345 (1987) (the Board reversed a removal action based on charges of excessive absenteeism where the agency failed to prove that it warned the appellant that her unavailability for duty on a regular, full-time or part-time basis, might result in an adverse action against her). Accordingly, the agency established all 3 criteria for the charge of inability to maintain regular attendance, despite the fact that the appellant's absences were covered by approved leave.

The record supports the agency's charge of inability to perform assigned duties for medical reasons.

14. The appellant primarily asserts that the charge of inability to perform assigned duties for medical reasons was not proven because the agency failed to show why her performance differed under Ng and Slaughter although she had the same physical limitations. PFRF, Tab 3 at 12-13. She asserts that she was performing her duties successfully under her OWCP/agency agreement that she could work part-time as a Secretary until she regained strength but that Slaughter thwarted her efforts. *Id.* at 15. Specifically, she asserts that Slaughter erroneously concluded that she was not performing her

Secretary duties, and then detailed her to the Cash Clerk position that presented numerous problems in order to support a removal action against her. *Id.* The appellant likens her case to *Schrodt v. U.S. Postal Service*, 79 M.S.P.R. 609, 616 (1998), claiming that the Board in *Schrodt* reversed a removal action because the agency failed to document the alleged insufficient performance of the appellant. PFRF, Tab 3 at 14.

15. The appellant errs in asserting that *Schrodt* warrants not sustaining the charge that she was unable to perform assigned duties for medical reasons. In *Schrodt*, the Board found that the agency had not proved its charge that the appellant was physically unable to perform the duties of his Distribution Clerk position. 79 M.S.P.R. at 614-16. The Board reasoned that no nexus was shown between the appellant's medical condition and the observed deficiencies in his performance or conduct. *Id.* The Board noted that the fitness-for-duty examination supporting the appellant's removal was of little probative value; and that, while agency witnesses testified as to their observations of the appellant's difficulty in performing certain tasks, there was no documentation of any such performance deficiencies. *Id.*

16. Here, the administrative judge sustained the agency's charge of inability to perform assigned duties for medical reasons based on a comparison of the duties of the appellant's Secretary position and doctors' reports of her medical conditions and restrictions as of August 4, 1997, when the appellant returned from her Cash Clerk detail. ID at 7. Specifically, the appellant suffered from thoracolumbar scoliosis, thoracolumbosacral strain-sprain, chronic degenerative disk disorder and facet joint arthritis, possible lumbar disk herniation with right leg nerve root compression, cervical trapezial myofascial strain/pain syndrome, bilateral carpal tunnel syndrome, and cerebral palsy with spastic diplegia – congenital. IAF-2,

Tab 5, Ex. A. Her medical restrictions were no lifting or carrying over 5 pounds, pushing or pulling over 10 pounds, repetitive bending, stooping, or repetitive twisting. IAF-1, Tab 4, Subtab 4h. The physical requirements of the Secretary position, included prolonged sitting at a computer 6-8 hours a day, keying or typing and extensive use of hands. *Id.*, Subtab 4x.

17. The administrative judge noted Ng's testimony that the appellant performed the essential functions of the full-time Secretary position only on a part-time basis. ID at 7; HT-3, Side A. The administrative judge noted Slaughter's testimony that the appellant had problems distributing incoming mail and routing mail because these tasks required standing and passing out mail. ID at 7; HT-1, Side A. Additionally, Slaughter testified in her deposition that the appellant could not perform the essential duties of time-keeping and typing confidential correspondence. IAF-2, Tab 8, Slaughter Dep. at 22, 24. Days before proposing the appellant's removal, Slaughter stated that the appellant had to be temporarily reassigned from the Module to the Health Unit because wrist pain prevented her from numericalizing Federal Archive Record Center papers. IAF-1, Tab 4, Subtab 4g. Further, as the administrative judge found, the absence of a medical release for the appellant's return to full-time work as a Secretary was significant and further supported the charge that she was medically unable to perform the duties of her Secretary position. ID at 6. The appellant, therefore, merely disagrees with the record evidence that both Ng and Slaughter agreed that she could not perform the essential duties of a full-time Secretary.

The appellant further asserts that the charge of inability to perform assigned duties for medical reasons was not proven because: (1) the removal proposal notice did not state the duties that she failed to perform; and (2) the agency erred in removing her under chapter 75 procedures. PFRF,

Tab 3 at 12-13. An agency is required to state the reasons for a proposed adverse action in sufficient detail to allow a charged employee the opportunity to make an informed reply. 5 U.S.C. § 7513(b)(1); *Plath v. Department of Justice*, 12 M.S.P.R. 421, 424 (1982). Here, the removal proposal notice met this requirement, as it clearly detailed the essential duties of the Secretary position, the appellant's medical conditions/restrictions and chronic absenteeism and her failures in performance. IAF-1, Tab 4, Subtab 4d. The appellant's challenge to the agency's use of chapter 75 procedures is unavailing. A charge of inability to perform job duties is distinct from a charge of unsatisfactory performance, and, unlike the latter, the former requires medical evidence showing that the employee is incapacitated for particular job duties due to a medical condition. *Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 69 (1997).

The record does not support the appellant's affirmative defense of disability discrimination.

18. The appellant asserts that the administrative judge erred in finding that she was not a qualified individual with a disability. PFRF, Tab 3 at 15. She asserts that she satisfactorily performed her job on a part-time basis. *Id.* at 17. She asserts that the agency failed to show that her part-time work since December 1995, or a job restructuring, or hiring of another full-time or part-time secretary, would impose an undue hardship. *Id.* at 18-21. She asserts that, even had the agency shown undue hardship, it was required to reassign her to a position for which she qualified. *Id.* She also asserts that the agency, instead, detailed her to a Cash Clerk position that aggravated her medical condition and did not attempt to locate another suitable position for her within the same office or at other facilities within the same commuting area. *Id.* at 19, 22. Further, she asserts that the agency merely stated that there were no other positions available for her. *Id.* at 22-23.

19. An agency is required to afford reasonable accommodation to the known limitations of a qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its program. 29 C.F.R. § 1614.203(c); *Patrick v. Department of the Air Force*, 39 M.S.P.R. 392, 395 (1988). Thus, to prevail on an affirmative defense of disability discrimination in a removal appeal, an appellant must establish that he is a qualified individual with a disability. A qualified individual with a disability is, inter alia, one who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of himself or others. 29 C.F.R. § 1614.203(a)(6). The administrative judge found that the appellant was not a qualified individual with a disability because her medical evidence showed that there was no reasonable accommodation that would allow her to perform the essential functions of the Secretary position. ID at 10.

20. The crux of the appellant's argument is that the Secretary position was part-time and that she performed the essential functions of the position with accommodations for her medical conditions. A review of the position description and the appointing documents for the Secretary position make clear, however, that the position was full-time. IAF-1, Tab 4, Subtab 4y. As noted above, the record shows that the resignation of Rodriguez, the only other Secretary in Module 4 besides the appellant, left Module 4 with one full-time Secretary when the work of Module 4 required a full-time Secretary. As such, the appellant's medical inability to work full-time precluded her from performing an essential duty of her official position. Further, as explained above, the appellant's medical conditions/restrictions precluded her from satisfactorily performing the essential duties of a Secretary. Therefore, the administrative judge correctly found that the appellant was not a qualified individual with a

disability. *See Harrison v. Department of Veterans Affairs*, EEOC Petition No. 03A00097, slip op. at 2-3 (Apr. 12, 2001) (an appellant with cerebral palsy and unrelated cognitive deficiencies was not a qualified individual with a disability because she could not perform her essential duties even with the help of a full-time assistant, because of her cognitive deficits and the fast-paced, high quality patient care she was expected to provide).

21. The administrative judge also found that, assuming arguendo that the appellant was a qualified individual with a disability, her suggested accommodations (hiring of another full-time or part-time Secretary) was not a reasonable accommodation and that permitting her to do part-time work or restructuring the Secretary position would cause an undue hardship on the agency's operations. ID at 11-13. Board law supports these findings. *See Hurst v. Department of the Navy*, 61 M.S.P.R. 277, 281 (1994) (an agency is not required to restructure a position if the tasks the employee is unable to perform are essential functions of the position).

22. As for the appellant's claim of entitlement to a reassignment as a reasonable accommodation, she errs. Reassignment is a reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his current position; or (2) all other reasonable accommodations would impose an undue hardship. EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 24 (Mar. 1, 1999). An appellant, however, must articulate to the extent possible a reasonable accommodation under which she believes she could perform the essential duties of her position or of a vacant funded position to which she could be reassigned. *Kohl v. Department of the Army*, 80 M.S.P.R. 678, ¶ 5 (1999). Here, the appellant did

not articulate any such vacant position to which she could be reassigned. Indeed, the administrative judge noted, and the appellant does not dispute, EEO Manager Castillo's testimony that the appellant did not request a vacant position as an accommodation. ID at 12; HT-4, Side A. Rather, she insisted that she wanted to remain a Secretary in Module 4. *Id.*

23. Finally, although the appellant argues that Slaughter detailed her to the Cash Clerk position in order to remove her based on her disability, the record shows otherwise. Perhaps the appellant asserts error in this regard because the agency's removal proposal notice discussed her performance during the Cash Clerk detail in the narrative supporting the charge of inability to perform assigned duties for medical reasons. IAF-1, Tab 4, Subtab 4d at 5-6. The SF 50-B documenting the appellant's removal, however, correctly reflected that she was removed from her permanent position of record as a Secretary, *id.*, Subtab 4b, and the administrative judge found that the appellant was removed from that position. ID at 1, 13. Further, as the administrative judge noted, the agency's detailing of the appellant to the potentially permanent position of a Cash Clerk buttresses the agency's position that it made every effort to accommodate the appellant's medical conditions and restrictions and did not impermissibly remove her because of her disability. ID at 11-12.

Accordingly, we find that the appellant has not proven her claim of disability

ORDER

24. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICETO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

Washington, D.C.

_____

Robert E. Taylor
Clerk of the Board

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1 Schedule A appointments occur, inter alia, when positions are filled by severely physically disabled persons who have demonstrated their ability to perform duties

satisfactorily, or have been certified by counselors of State vocational rehabilitation agencies or the Department of Veterans Affairs, as likely to succeed in the performance of the duties. 5 C.F.R. § 213.3102(u).

2 In response to OWCP's request for a second opinion on the appellant's medical condition, Dr. David Wren, an orthopedist, had opined on January 23, 1997, that the appellant would be able to resume her full-time job. IAF-2, Tab 5, Ex. A. He described the appellant's medical conditions as thoracolumbar scoliosis, thoracolumbosacral strain-sprain, chronic degenerative disk disorder and facet joint arthritis, possible lumbar disk herniation with right leg nerve root compression, cervical trapezial myofascial strain/pain syndrome, bilateral carpal tunnel syndrome, and cerebral palsy with spastic diplegia - congenital. Id. at 9.

APPENDIX L
Nov 18, 2003 Request to the United States Court of Appeals for the Federal Circuit to review final decision in *Allen v OPM* Docket No. SF-844E-01-0326-M-I

Tuesday, November 18, 2003

Request to the Unites States Court of Appeals for the Federal Circuit to review this final decision.

United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

From

Ethan Allen

PO Box 70692

Pt. Richmond, CA 94807

(510) 237 9765

RE:

Docket # SF-844E-01-0326-M-I

(CSA 8 140 644)

I am requesting that the Unites States Court of Appeals for the Federal Circuit to review this case and reverse the administrative judge's ruling. Further that the Unites States Court of Appeals for the Federal Circuit order OPM to pay me the disability retirement benefits to which I am entitled.

I also request that because the Federal Circuit find that the part time assignment that I was given was not an accommodation within the meaning of the statute, and because the Board previously found that I satisfied all the other criteria, I request that the Federal Circuit reverse OPM's final decision and order OPM to award the appellant disability retirement benefits.

Please charge the $100 filing fee to my

MASTERCARD 5515 6601 0109 2870 (exp 10/05)

under the name of **Ethan Allen**

This case was reviewed by the Unites States Court of Appeals for the Federal Circuit once, and returned to the Merit System Protection Board to clear up several outstanding issues. Those issues are not addressed by this current order of the MSPB, and so I again request that the case be remanded to MSPB.

I am attaching the **Designation of Representative for Appellant** document that named Mr. Handsher as my representative, and the **Reply by Appellant to agency response to MSPB Order** document that he drafted because I have not be able to determine if they are or are not part of the case file. I know that they were mailed properly and timely, but I do not know if they were received.

The three outstanding questions were:

1) *What is the legal standard for determining when attendance problems constitute a deficiency?*
2) *Did the appellant demonstrate a deficiency in attendance?*
3) *If there was a deficiency, was the appellant's employing agency accommodation of that deficiency temporary or permanent?*

I believe that a telephone conference call would be very useful to resolve these questions, and Mr. Handsher can be reached at 415-241-1160.

My position on this is that 1) the legal standard is that not being able to work full-time schedule in a full time position constitutes a deficiency. I base this on the case of **TERRY L. DAVIS, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT**, Agency. (CSA 8 114 947) DOCKET Number CH-844E-99-0566-I-1 DATE: September 13.

> The appellant's supervisor's statements as to the inability to fully accommodate the appellant are unrebutted, and we find no reason not to accept them. Moreover, Dr. Silbert found the appellant was unable to work a 40-hour week. IAF Tab 3, Subtab IIB. To the extent that this may imply an ability to perform any of her duties for a shorter period, we note that a full-time employee who cannot be placed in a full-time position has not been reasonably accommodated. See Sangenito v. Office of Personnel Management, 85 M.S.P.R. 211, 217 (2000).

I further claim that a legal standard was set in **DARREL CLARK, v UPSP**. PH-0752-98-0161-I-1 where "satisfactory attendance" was defined as having no more than three unscheduled absences during any 6-month period and no instances of absence without leave. I claim that another standard was set in MATTIE M. COLE v OPM. This standard is that a total of 235 hours of absence in an undefined period is an attendance deficiency. (The appellant's supervisor stated on November 14, 1998, that the appellant's attendance had become unacceptable, having used 50 hours of annual leave, four hours of sick leave, and 181 hours of leave without pay.[2] IAF, Tab 3, Subtab D. Footnote 2 [2] The supervisor's statement did not clarify the period during which these hours of leave were used.) I claim another standard was set in **SHIRLEY A. REDMOND v OPM** CH-844E-00-0479-I-1. This standard is that when an appellant's ability to persist at work-like tasks for the full course of an 8-hour day and 5-day workweek is significantly compromised, the appellant has a disability. In this case, two to three instances per week of incapacity to work for an hour to an hour and a half were disabling.

On the question of did the appellant demonstrate a deficiency in attendance, the record indicates yes based on the standard of the Davis case. The record clearly shows that the appellant was working in a full time position under 'maxiflex' and that the appellant was working less than 80 hours per pay period. The **DOD Financial Management Regulation** (available at http://www.dod.mil/comptroller/fmr/08/08_02.pdf)

defines full time and part time under maxiflex. This document states that Maxiflex is a type of Flexible Work Schedule. That Full time for a Flexible Work Schedule is 80 hours biweekly. And that part time is less than 80 hours biweekly.

> 1)"Maxiflex is a flexible work schedule that contains core hours on fewer than 10 work days in the biweekly pay period and in which an employee has a basic work requirement of 80 hours for the biweekly pay period (or multiple thereof). The employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization."
>
> 2) "Flexible Work Schedule. Under certain flexible schedules, DoD civilian employees may work longer or shorter hours, including credit hours on any given workday, without taking leave or being paid overtime, so long as their basic biweekly work requirements are met (5 U.S.C. 6123) (reference (b)). By electing to work hours in excess of their tour of duty, employees also may complete the biweekly basic work requirements in fewer than 10 workdays without being paid overtime or being charged leave for the nonworkdays. This provision does not apply to TP pay plan employees.
>
> b. In the case of a full-time employee, an 80-hour biweekly work requirement allows an employee to determine his or her own schedule within the limits set by the employing activity. A part-time employee determines his or her own schedule for a biweekly work requirement of less than 80 hours.

It has been established that working a part time schedule in a full time position was unacceptable to management. (See email in case file from Maria Jamini Ramirez). It has been established that the applicant was working less than 80 hours biweekly for four years. (See testimony of

Ingrid Fields and of applicant). So it follows that appellant demonstrated a deficiency in attendance.

Using the standard set in the Clark case, the record again indicates that the appellant had an attendance deficiency. The record shows that the appellant requested LWOP through normal channels for time to attend therapy. The record shows that the request was denied and that the appellant was subsequently absent. While no charges of AWOL were recorded, the appellant was routinely absent without prior authorized leave. Because the appellant's chronic pain incidents occurred randomly, most of the leave hours were started before leave was requested. There were no 6 month periods with less than 3 unscheduled absences in the last four years the appellant was employed (Dec 1995 to November 1999).

Using the standard set in the Redmond case, the record again indicates that the appellant had an attendance deficiency. The appellants also suffered from headaches that occurred two to three times per week (or more often) and lasted for over an hour.

Finally, according to
http://www.opm.gov/asd/htm/bal101/BAL10115.htm

The **definition of Useful and Efficient Service**:

- Acceptable performance of the critical or essential elements of the position or the ability to perform at that level, and
- Satisfactory conduct and attendance.

Note: Service which is not "useful and efficient" is a level of performance or attendance which, if it were to continue, would warrant denial of a within-grade increase, demotion, separation, or other remedial action.

It was the testimony of Ingrid Fields that the appellant was under 'pay banding' and that under this pilot program within-grade increases were called "incentive pay points" and that the appellant was given a zero for these "incentive pay points". Hence the appellant was denied a within-grade increase. Hence, the appellant's service was not useful and efficient.

EXTRACT OF INGRID FIELD'S TESTIMONY:

> Now, we also have incentive pay points. Incentive pay points can be a combination of continuing pay which is like a permanent salary increase or -- and/or bonus pay, which is like a one-time payment.

RE question 3: *If there was a deficiency, was the appellant's employing agency accommodation of that deficiency temporary or permanent?*

The accommodation was temporary. Since the accommodation was an unofficial change to a part time schedule, this was not a formal assignment to an established vacant position, and that, in the absence of such an assignment, the appellant had not been accommodated and is, therefore, entitled to disability retirement. (see Brickers v. OPM) Further, management had provided the appellant with written notice that a permanent change to a part time schedule while in a full time position was not acceptable, and working such a schedule while in a full time position would result in disciplinary measures, up to and including separation from service. This is evidenced by the appellant's requests for Leave With Out Pay to attend therapy that were denied.

See Sangeenito v OPM

> There is also no dispute that the appellant's letter carrier position was full time employment. As the Board stated in Paupaw v. Office of Personnel

Management, 51 M.S.P.R. 390, 393 (1991), "[a] change from a full-time to a part-time schedule is not considered to be at the same pay

level." See also Sucic, 64 M.S.P.R. at 288 (same rule applied as to application under Federal Employees' Retirement System); Marczewski v. Office of Personnel Management, 80 M.S.P.R. 343, 348 (1998) ("[i]f the appellant could not work at a full-time position, then he could not be reassigned to one").

Finally, the undisputed fact that the appellant was RIFed is proof that the accommodation was temporary. See BRUCE A. BRACEY, v OFFICE OF PERSONNEL MANAGEMENT, DOCKET NUMBER DC-831E-97-0643-M-1 DATE: August 28, 2001. In the Bracey case, Bruce Bracey also worked until he was separated by RIF procedures and he was awarded disability benefits because the RIF terminated his accommodations.

It is clear from **DOLORES L. PAUPAW, v. OFFICE OF PERSONNEL MANAGEMENT, DOCKET NUMBER: NY831E9010533** that a change from a full time to a part times schedule is not a reasonable accommodation. It is clear from the testimony and the case law that the appellant was in a full time position under maxiflex. It is clear from the testimony of Ingrid Fields and the appellant that the appellant was working less than 80 hours per pay period.

DOLORES L. PAUPAW, v. OFFICE OF PERSONNEL MANAGEMENT,
DOCKET NUMBER: NY831E9010533

DATE: Nov. 25, 1991

Even where the evidence establishes that an employee is unable to perform the regular duties of her position, she should not be retired on disability

if the agency can reasonably accommodate her physical restrictions with light duty assignments. *See Benjamin v . Office of Personnel Management,* 45 M.S.P.R. 187, 190 (1990). An agency need not have formally established a separate light-duty position with standards against which an employee's performance can be measured. All that is required is a showing that the agency has reasonably accommodated the employee's condition and that it is more likely than not that such accommodation will continue. *Id.* For a light duty assignment to be a reasonable accommodation, however, it must be at the same grade or pay level and tenure as the employee's regular duties. *See* 5 C.F.R. § 831.502(b)(7). A change from a full-time to a part-time schedule is not considered to be at the same pay level. Federal Personnel Manual Supplement 831-1, subch. S10-4(k) (June 23, 1983).

The record shows that the appellant was working part time hours in a full time position for several years; this was clearly a deficiency in attendance. The record shows that the appellant was separated from service on November 30, 1999, clearly showing that the accommodation ended, and hence was temporary.

The record also shows that the appellant was working a part time schedule in a full time position while using LWOP and annual leave and sick leave to fill in the non-worked hours. The record shows that LWOP needed to be approved or denied by the appellant's second level supervisor (Maria Jamini-Ramirez). The record shows that the appellants requests for LWOP were approved by Maria Jamini-Ramirez when the appellant's first line supervisor (Robert Williamson) believed the situation was temporary. (This is shown in the emails in the case file.) The record also clearly shows that the appellant's requests for LWOP were denied by Maria Jamini-Ramirez when they appeared to be a permanent change to a part time

schedule. The file includes the email from Maria Jamini-Ramirez saying that LWOP to attend physician prescribed therapy was denied because granting the LWOP requested would have been equivalent to a permanent change a part time position. Hence the record shows that the 'accommodation' was unlikely to continue indefinitely.

Again, I ask the court to order OPM to grant my disability application. Thank you.

APPENDIX M
March 10, 2004, Memorandum for Oral Argument presented to the Federal Circuit Court in the case of *Allen v OPM* 04-3077

IN THE UNITED STATES COURT OF APPEAL

FOR THE FEDERAL CIRCUIT COURT

04-3077

ETHAN E. ALLEN,)
PETITIONER)
V.)
OFFICE OF PERSONNEL)
MANAGEMENT,)
RESPONDENT.)

Date: March 10, 2004

Memorandum for Oral Argument

On February 24, 2004, I received the Notice of Submission Without Oral Argument. This Notice indicates that I can write in why I would make an oral argument and/or answer points raised by the respondent.

The main reason I would make an oral argument is to request that this court direct the Merit Systems Protection Board and the Office of Personnel Management to grant the disability request. I would also use the opportunity to highlight certain findings, certain OPM published information, and some case law.

The first item I would highlight is the ORDER dated June 27 2003 for Docket # SF-844E-01-0326-M-1 remanding the case to the MSPB for resolution of three issues:

1) *What is the legal standard for determining when attendance problems constitute a deficiency?*

2) *Did the appellant demonstrate a deficiency in attendance?*

3) *If there was a deficiency, was the appellant's employing agency accommodation of that deficiency temporary or permanent?*

The decision of Administrative Judge LuNell C. Anderson confirmed that there were attendance problems caused by my medical condition and found 'that the agency accommodated these attendance problems.' The principal accommodation was to allow me (the applicant) to work part time in a full time position for approximately four years. However, according to **DOLORES L. PAUPAW, v. OFFICE OF PERSONNEL MANAGEMENT, DOCKET NUMBER: NY831E9010533** *"A change from a full-time to a part-time schedule is not considered to be at the same pay level. Federal Personnel Manual Supplement 831-1, subch. S10-4(k) (June 23, 1983). Because the appellant's regular position as a Distribution Clerk was a full-time position, placing her in a part-time light duty assignment would not constitute a reasonable accommodation precluding an award of disability retirement benefits. Cf. Noyer v. Office of Personnel Management, 44 M.S.P.R. 336 (1990) (the administrative judge erred in finding that the employing agency could reasonably accommodate the employee by assigning her to light duty positions that were not of the same tenure as her regular position)."* From Huffman v OPM (DOCKET NUMBER CH-831E-01-0133-I-1: September 30, 2002) *It is well established that the placement of a full-time employee in a part-time position does not satisfy the agency's obligation to attempt to accommodate the employee's disabling condition. See 5 C.F.R. § 831.1201; Marczewski v. Office of Personnel Management, 80 M.S.P.R. 343, ¶¶ 9-10 (1999).*

I would use the oral argument to highlight that according to **FERS Disability Facts** (available at http://www.opm.gov/asd/htm/bal101/BAL10115.htm):

> **Reasonable Accommodation** Before you can be considered eligible for disability retirement benefits, your employing agency must determine that you are not qualified for reassignment to any other vacant position within your agency and commuting area at the same grade or pay level of the position you currently occupy.
>
> **Definition of Useful and Efficient Service**:
>
> - Acceptable performance of the critical or essential elements of the position or the ability to perform at that level, and
> - Satisfactory conduct and attendance.
>
> **Note**: Service which is not "useful and efficient" is a level of performance or attendance which, if it were to continue, would warrant denial of a within-grade increase, demotion, separation, or other remedial action.

NOTE: Of the 4 items in the Note above, I was all 4.

- Denial of within grade increase – The transcript of the testimony of Ingrid Fields shows that I was denied a within grade increase. Her words on the subject are "*Now, did I see that you were excelling to the point that I felt that you deserved a bonus or you deserved an increase in salary? No,*"
- Demotion - I was demoted in that I was unofficially working a part time schedule in a full time position for nearly four years. I submit that because I was forced to use LWOP to fill in the hours missed due to my medical condition, I was earning less per year than my co-workers.
- Separation - my second level supervisor informed me, in writing, that if my attendance did not improve I could be terminated. Then I was separated by a Reduction in Force.

- Other Remedial Action - I was placed on an electronic sign in and out (remedial action) because of my irregular attendance due to my medical condition.

I submit that the above indicates that although the agency accommodated my attendance problems, it was not a 'reasonable accommodation' as the term is used in the parts of the Code of Federal Regulations that address disability retirement.

I would further highlight that congress specifically addressed attendance as grounds for a disability retirement while the arguments of the agency against my disability retirement were based on performance, not attendance. I would highlight that while mere absence from work without a medical justification may not be sufficient to establish disability, it merits consideration in judging disability. *Coleman v. Office of Personnel Management*, 43 M.S.P.R. 570, 574 (1990), overruled on other grounds by *Alford v. Office of Personnel Management*, 79 M.S.P.R. 114 (1998). Absences due to illness prove disability. *Arnone v. OPM*, 7 MSPR 212 (1981). Being present at work is essential to performing useful and efficient service; disability may be shown by a deficiency in performance, conduct, **or** attendance. *5 U.S.C. § 8451; 5 C.F.R. § 844.103(a).* I would also highlight **Bracey v. Office of Personnel Management, 236 F.3d 1356 (Fed. Cir. 2001).** There, the Court found that the light-duty assignment provided to the disability retirement applicant was not an "assignment to a vacant position" precluding disability retirement, because "assignment to a vacant position" requires placing the injured employee into an officially established position that is graded and classified. My position was full time, but I was only working part-time.

I would use the oral argument to highlight the following cases about when attendance problems clearly constitute a deficiency. **DANIEL T. HOWARD, JR. v.**

DEPARTMENT OF THE ARMY Docket No.PH075209128 Removed for 1 hour of absence without leave (AWOL) on September 25, 1979. **BILLY J. LEMONS v. DEPARTMENT OF THE AIR FORCE DOCKET No. DA7521390136** Removed based on a charge of unauthorized absence for four hours. And **EMERY RICHARDSON v. DEPARTMENT OF JUSTICE DOCKET No. SF07528110018** Removed for charge of absence without leave (AWOL) for eight hours.

These cases indicate that federal employees could be removed for being absent without prior approved leave for as little as one hour. I (the appellant) was never charged with being AWOL nor with failure to maintain a regular schedule. However, the nature of my medical condition caused many unscheduled absences from work on a continuing basis. I had exhausted my regular leave, I had requested LWOP to cover continuing time off from work due to my medical condition, and the agency had denied these requests. Despite that, I was absent from work due to my medical condition, and my supervisors consistently approved LWOP retroactively for the time I missed. Again, I was never charged with being AWOL, but I was given an email from my second level supervisor stating that my attendance was not acceptable along with the Indian Head Instruction, which includes the following:

> "5. Discretionary Guidance. A supervisor must not deny or cancel a request for leave, sick or otherwise, for arbitrary or capricious reasons. A supervisor's decision to approve a sick leave request normally needs to be based on the necessity for the employee's services. When the supervisor exercises his authority to approve an employee's request for leave, including LWOP, he has presumably determined that the employee's presence on the job is not required. The supervisor may, if he needs the employee's services, deny leave, and if the employee does not report for duty, charges the absence to AWOL. A denial of leave and a charge to AWOL is not punitive and does not mean that the employee has insufficient reason for requesting leave. It means that the employee's presence is required and that the reason for requesting

leave is not one for which leave must be approved. However, periods of AWOL can become the basis for initiating adverse action."

The email from my second level supervisor stated in part "*my concern with this situation is that Ethan may be trying to work a part-time schedule filling the not worked hours with accommodation of sick leave, annual leave, and leave without pay. This is not acceptable.*"

I would also highlight that my testimony and evidence presented at the hearing included that this same second level supervisor directed me to apply for disability retirement.

I would use the oral argument to state that given the above, it reasonable to expect that the agency's 'accommodation' of my medical condition was temporary in nature and was primarily allowing me to work part-time in a full time position; hence it was clearly neither permanent nor a 'reasonable accommodation' under disability retirement case law.

I would further highlight that congress specifically addressed attendance as grounds for a disability retirement while the arguments of the agency were based on performance, not attendance. I would highlight that while mere absence from work without a medical justification may not be sufficient to establish disability, it merits consideration in judging disability. *Coleman v. Office of Personnel Management*, 43 M.S.P.R. 570, 574 (1990), overruled on other grounds by *Alford v. Office of Personnel Management*, 79 M.S.P.R. 114 (1998). Absences due to illness prove disability. *Arnone v. OPM*, 7 MSPR 212 (1981). Being present at work is essential to performing useful and efficient service; disability may be shown by a deficiency in performance, conduct, **or** attendance. *5 U.S.C. § 8451; 5 C.F.R. § 844.103(a).*

I would use the oral argument opportunity to highlight the definition of 'part-time' as it applied to this case. I would highlight that the transcripts of the trial clearly indicate that I (the appellant) was working in a full time position under 'maxiflex' and that I (the appellant) was working less than 80 hours per pay period. I would also highlight that the **DOD Financial Management Regulation** (available at http://www.dod.mil/comptroller/fmr/08/08_02.pdf) defines full time and part time under maxiflex. This document states that Maxiflex is a type of Flexible Work Schedule. That Full time for a Flexible Work Schedule is 80 hours biweekly. And that part time is less than 80 hours biweekly.

I would then direct the court to another case involving a federal employee working part-time in a full time position. In the case of **BRENDA J. COMBS, v. SOCIAL SECURITY-ADMINISTRATION, DOCKET NUMBER SF-0752-00-0107-I-3,** Brenda Combs was removed from her position for working part time in a full time position and she tried to argue that working part time in her full time position was a reasonable accommodation and so she should not be removed from service. The court determined that:

> The crux of the appellant's argument is that the Secretary position was part-time and that she performed the essential functions of the position with accommodations for her medical conditions. A review of the position description and the appointing documents for the Secretary position make clear, however, that the position was full-time. IAF-1, Tab 4, Subtab 4y. As noted above, the record shows that the resignation of Rodriguez, the only other Secretary in Module 4 besides the appellant, left Module 4 with one full-time Secretary when the work of Module 4 required a full-time Secretary. As such, the appellant's medical inability to work full-time precluded her from performing an essential duty of her official position.

Also, from **BRENDA J. COMBS, v. SOCIAL SECURITY ADMINISTRATION**

- In Rabago, the Board stated that, as a "general rule[,] ... an adverse action cannot be based on an employee's use of approved leave." 25 M.S.P.R. at 533. The Board reiterated, however, an exception to that rule which the Federal Personnel Manual first set forth and the Board first addressed in Cook v. Department of the Army, 18 M.S.P.R. 610, 611-12 (1984). Specifically, provided that certain criteria are met, an agency can bring an action against an employee for excessive approved absence. Rabago, 25 M.S.P.R. at 533.

- To take such an action, however, an agency must establish that: (1) The employee was absent for compelling reasons beyond his control so that agency approval or disapproval was immaterial because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis; and (3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. Id. Such an action should also be taken only under unusual circumstances, id., i.e., such as when the employee is unable to return to duty because of the continuing effects of illness or injury, Schultz v. U.S. Navy, 810 F.2d 1133, 1137 n.* (Fed. Cir. 1987); Allen v. Department of Army, 76 M.S.P.R. 564, 570 (1997). Where appropriate, the Board has applied this exception to uphold an agency's adverse action charge of excessive approved absences. See Allen, 76 M.S.P.R. at 571; Gaskins v.

Department of the Air Force, 36 M.S.P.R. 331, 334-35 (1988).

I would address all three of these criteria:

(1) The employee was absent for compelling reasons beyond his control so that agency approval or disapproval was immaterial because the employee could not be on the job; - The record clearly shows that I (the appellant) was absent because of my medical condition, and that that agency approval or disapproval was immaterial to my absences.

(2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis; - As I indicated above, my absences had continued for approximately four years and were due to a chronic medical condition so there was no expectation of an end to my unscheduled absences. Also, I had been given warning that adverse action could be taken (the Indian Head Instruction).

(3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. – The same Indian Head instruction that addressed item (2) states that my second level supervisor had determined that my attendance was necessary when she denied my application for leave. I submit that this clearly indicates that my position needed to be filled by an employee available for duty on a regular, full-time or part-time basis.

I would also use oral arguments to direct the court to the case of **DOLORES L. PAUPAW, v. OFFICE OF PERSONNEL MANAGEMENT, DOCKET NUMBER: NY831E9010533** Even where the evidence establishes that an employee is unable to perform the regular duties of her position, she should not be retired on disability if the agency can reasonably accommodate her physical restrictions with light duty assignments. *See Benjamin v . Office of Personnel Management,* 45

M.S.P.R. 187, 190 (1990). An agency need not have formally established a separate light-duty position with standards against which an employee's performance can be measured. All that is required is a showing that the agency has reasonably accommodated the employee's condition and that it is more likely than not that such accommodation will continue. *Id.* For a light duty assignment to be a reasonable accommodation, however, it must be at the same grade or pay level and tenure as the employee's regular duties. *See* 5 C.F.R. § 831.502(b)(7). A change from a full-time to a part-time schedule is not considered to be at the same pay level. Federal Personnel Manual Supplement 831-1, subch. S10-4(k) (June 23, 1983). Because the appellant's regular position as a Distribution Clerk was a full-time position, placing her in a part-time light duty assignment would not constitute a reasonable accommodation precluding an award of disability retirement benefits. *Cf. Noyer v. Office of Personnel Management,* 44 M.S.P.R. 336 (1990) (the administrative judge erred in finding that the employing agency could reasonably accommodate the employee by assigning her to light duty positions that were not of the same tenure as her regular position).

I summary, I believe the answers to the courts three issues are (1) that one legal standard of determining when an attendance problem is a deficiency is when the person is working part time in a full time position with no expectation of resuming a full time schedule. (2) the appellant clearly demonstrated a deficiency in attendance (3) the accommodation would not have continued indefinitely and even if it did, it was not a 'reasonable accommodation'.

Finally, I would use oral argument to ask the court to consider the case of Bruner v. Office of Personnel Management, 996 F.2d 290 (1993) in light of the fact that I (the appellant) was directed to apply for disability retirement by my second level supervisor. The U.S. Court of Appeals for the Federal Circuit, in Bruner v OPM, decided that removal from the Federal Service shifted the

burden of production from the applicant to the agency. I would ask the court to determine what standards were applied in my case and if the burden of production should have been shifted to the agency.

In closing, I request that the court grant my disability application.

Ethan Allen

APPENDIX N
ANTHONY v OPM Cite as 58 F.3d 620 (Fed. Cir. 1995)

ANTHONY v. OFFICE OF PERSONNEL MANAGEMENT Cite as 58 F.3d 620 (Fed. Cir. 1995)

William A. ANTHONY, v

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

United States Court of Appeals, Federal Circuit.

June 27, 1995.

Postal Service employee applied to the Office of Personnel Management (OPM) for disability retirement under the Federal Employees Retirement System (FERS). OPM denied application on ground that the Postal Service had offered employee a light-duty position to accommodate his medical limitations and that he had failed to prove his inability to perform in that position. Employee appealed. The Merit Systems Protection Board (MSPB), 63 M.S.P.R. 289, affirmed denial of disability retirement benefits, and employee sought judicial review. The Court of Appeals, Plager, Circuit Judge, held that: (1) statute precluded judicial review of factual underpinnings of disability determination, and (2) employee failed to prove that light-duty position offered by Postal Service was not permanent or full time and was not a reasonable offer if reassignment, for purposes of statute governing disability retirement eligibility.

Affirmed.

1. Administrative Law and Procedure

~763, 791

Officers and Public Employees

~101.5(2)

Court of Appeals reviews final decisions of the Merit Systems Protection Board (MSPB) to determine if there is substantial evidence in the record supporting factual findings, and to ensure that, in light of that evidence, conclusions of fact and decisions emanating therefrom are not arbitrary or capricious. 5 U.S.C.A. § 7703(c).

Administrative Law and Procedure

~651

Only upon a showing of clear and cong evidence of contrary legislative intent courts restrict access to judicial review.

Officers and Public Employees

¤~1O1.5(2)

Under Lindahl standard for review of disability retirement determinations under the Civil Service Retirement System (CSRS) of Appeals rejects challenges to factual initiations of physical disability; same standard applies to review of disability determinations under the Federal Employees Retirement System (FERS), considering that both statutes serve same purpose of identifying scope of authority of Office of Personnel Management (OPM) to administer disability retirement and other benefits. 5 U.S.C.A. §~ 8347(c, d), 8461(d, e).

4. Administrative Law and Procedure

~799, 800

Officers and Public Employees

C~101.5(2)

Court of Appeals is precluded by statute governing review of disability retirement decisions involving benefits under the Federal Employees Retirement System (FERS) from

reviewing factual underpinnings of physical disability determinations, but Court may address whether there has been a substantial departure from important procedural rights, misconstruction of governing legislation, or some like error going to heart of the administrative determination. 5 U.S.CA.§ S461(d, e).

5. Officers and Public Employees

-401.5(1)

Postal Service's offer to employee of light-duty position to accommodate his medical limitations was offer of a full-time position, for purposes of statute governing eligibility for disability retirement under the Federal Employees Retirement System (FERS); offer on its face was full time, and statement that employee could work less depending on advice of doctor meant simply that employee could work full-time hours until, based on doctor's advice, he chose to work a reduced schedule. 5 IJ.S.C.A. § 8451(a)(2)(A).

6. Officers and Public Employees

~10L5(1)

Even assuming that article of collective bargaining agreement allowing the Postal Service to send light-duty employees home early without full-time pay on occasions when there is a shortage of work applied to employee who applied for disability retirement, it did not preclude finding that light-duty position offered to employee was a full-time position, for purposes of statute governing eligibility for disability retirement. 5 U.S.C.A. § 8451(a)(2)(A); 5 C.F.R. § 844.102.

7. Officers and Public Employees

-101.5(1)

Postal Service employee did not establish that light-duty position offered by Postal Service to accommodate employee's medical limitations was not permanent for purposes of statute governing eligibility for disability

retirement, on ground that Service had not provided a written description of position as permanent; Service offered employee light-duty position for as long as he remained disabled, and lack of written statement of permanence was irrelevant, where nothing in the record suggested impermanence. 5 U.S.C.A. § 8451(a)(2)(A).

Craig D. Robinson, Brousseau & Robinson, of Springfield, MA, submitted for petitioner. With him on the brief was Paul Bradford Brousseau.

Carold L. Wallack, Attorney, Commercial Litigation Branch, Dept. of Justice, of Washington, DC, submitted for respondent. With her on the brief were Frank W. Hunger, Asst. Atty. Gen., David M. Cohen, Director and James M. Kinsella, Asst. Director. Also on the brief were Lorraine Lewis, General Counsel and Jill Gerstenfield, Attorney, Office of General Counsel, Office of Personnel Management, of counsel.

Before NEWMAN, PLAGER, and CLEVENGER, Circuit Judges.

PLAGER, Circuit Judge.

This case requires us to decide, for the first time, whether the Supreme Court's interpretation of the statutes governing our review of disability retirement decisions involving benefits under the Civil Service Retirement System ("CSRS"), see Lindahl v. Office of Personnel Management, 470 U.S. 768, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985), applies to the parallel provisions for review of disability retirement decisions under the

Federal Employees Retirement System ('FERS')[1] We conclude that it does Under the limited scope of review thus available to us, we find no error in the decision of the Merit Systems Protection Board ("Board"), which affirmed the Office of Personnel Management's denial of FERS disability retirement benefits to William A. Anthony ("Petitioner")[2]. The Board's decision is affirmed.

BACKGROUND

Petitioner served as Postmaster in Stock-bridge, Massachusetts. In March 1986, he suffered a work-related spinal injury, and in August 1986 he underwent surgery for a hermated disc. Thereafter he returned to his Postmaster duties *

In 1989, Petitioner, as a result of violating certain provisions of the Postal Service Code of Ethical Conduct, was demoted and transferred to a distribution clerk position in a neighboring town. The Postal Service wrote to Petitioner on September 28, 1989, instructing him to report to his new position on October 1, 1989. Citing back problems relating to his 1986 injury, Petitioner did not return to work, instead obtaining successive periods of administrative leave and leave without pay.

On May 9, 1990, Dr. Laurence Cohen, the doctor who performed Petitioner's 1986 disc operation, wrote to the

---

[1] 1. In 1986, Congress enacted FERS as a successor to the retirement benefits scheme for federal employees under CSRS, which was established in 1920. See S.Rep. No. 99-166, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 1405, 1406; ILConf.Rep. No. 99-606, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 1508, 1509-10.

Both systems presently remain in effect persons employed on or after January 1, 1984, are automatically placed in FERS See 5 U SC § 8401(11) (1988) 42 U S C § 410(a)(S) (1988)

[2] 2. 63 M.S.I'.R. 289 (1994).

Postal Service informing it that in Dr Cohen's opinion, Petitioner was partially disabled:

> [He] should avoid work which requires prolonged sitting or standing or repeated bending He should probably not lift morel than 15 or 20 pounds of weight on a repetitive basis. Finally, he probably can be expected to have difficulty with a 40 hour work week and, possibly, should even be considered for working at a less than 40 hour work week.
>
> I think these recommendations are permanent and I think his condition is not only permanent, but might well worsen in time.

On July 3, 1990, the Postal Service offered Petitioner a modified "light-duty" distribution clerk position, which would not require heavy lifting, bending, or prolonged sitting or standing. Petitioner rejected this position and remained absent from work. Petitioner did not return to work at any time following his 1989 demotion.

In December 1990 Petitioner applied to the Office of Personnel Management (OPM) for FERS disability retirement. Disability benefits under FERS are governed by Subchapter V of Title 5 United States Code, Chapter 84. See generally 5 U.S.C. §~ 8451-8456 (1988). Section 8451(a)(1)(A) provides that an employee who completes at least 18 months of creditable civilian service and has become disabled shall be retired, with an annuity calculated in accordance with the statute, on application by either the employee or the agency. 5 U.S.C. §~ 8451(a)(1)(A), 8451(c).

However, the statute provides that an employee will not be eligible for such disability retirement if the employee "has declined a reasonable offer of reassignment to a vacant position in the employee's agency for which the employee is qualified." An offer of reassignment must involve a position at the same or higher grade or pay level and tenure as the employee's current position, and must be full-time if the current position is full-time. See id § 8451(a)(2)(A); 5 C.F.R. § 844.102; see also Federal Personnel Manual Supp.

831-1,: Subchapter S10-4(k) (June 23, 1988)[3] (part-time schedule is not considered at same pay level as full-time schedule).

OPM denied Petitioner's application on the grounds that the Postal Service had offered him a light-duty position in July 1990 to accommodate his medical limitations and that a he had failed to prove his inability to perform "useful and efficient service" in that position.[4]

Petitioner then appealed to the Board, arguing that the medical evidence proved him unable to perform the light-duty position. Petitioner also argued that the light-duty position was not a "reasonable accommodation," i.e. a reasonable offer of reassignment, for the purpose of determining eligibility for benefits, in that it was not permanent or full-time and thus not of the same tenure and grade or pay level as the regular distribution clerk position.

Based on her review of the medical evidence, the Administrative Judge (AJ) concluded that Petitioner had not proven that he could not perform in the light-duty position. The AJ rejected Petitioner's claims that the light-duty position was not permanent or full-time, citing the Postal Service's unrebutted testimony that the light-duty position

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[3] 3. Unless otherwise noted, all United States Code citations are to the 1988 edition.

[4] 4. See 5 U.S.C. § 8451(a)(2)(A)(iii). OPM apparently sent Petitioner a preliminary determination of denial on February 27, 1991, which allowed Petitioner to submit any additional evidence within 30 days; this letter is not in the record,

Petitioner did not submit further evidence within that time and OPM issued a final denial on May 10, 1991. Petitioner requested reconsideration, submitting additional evidence relating to a spinal fusion operation he underwent in May 1991. On October 6, 1993, OPM denied reconsideration.

was "available as long as [Petitioner] remained disabled." The AJ also found that the light-duty position was not rendered impermanent by a 1987 arbitral award, which construed the terms of the Postal Service's National Collective Bargaining Agreement ("National Agreement") to allow the agency, on occasions when there was a shortage of work, to send light-duty employees home early without full-time pay.

With respect to whether the position was full-time, the AJ found that Petitioner had not shown any assignment to a part-time schedule, and that while the Postal Service had indicated its willingness to reduce Petitioner's hours if deemed necessary by his doctor, the agency's initial offer was for full-time light-duty work. The AJ noted that because Petitioner had never reported for work, his concern that the hours would be less than full-time was purely speculative.

Accordingly, the AJ affirmed OPM's denial of disability retirement benefits based on Petitioner's failure to prove by a preponderance of the evidence that he was unable to perform in the light-duty position. The AJ's decision became the final decision of the Board following denial of Petitioner's Petition for Review. 5 C.F.R. § 1201.113(b) (1994). This appeal followed. We have jurisdiction over the appeal under 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). See Lindahl v. Office of Personnel Management, 470 U.S. 768, 791-99, 105 S.Ct. 1620, 1633-38, 84 L.Ed.2d 674 (1985).

DISCUSSION

On appeal, Petitioner asserts that the Board "misread, overlooked and failed to properly interpret medical evidence" in concluding that he failed to prove inability to perform the duties of the light-duty position. He also renews his claim that the light-duty position was not a reasonable offer of reassignment because it was not permanent or full time.

I.

[1] We first consider the scope of our review of the Board's decision. Ordinarily, this court reviews final decisions of the Board under the Administrative Procedure Act-type standard found at 5 U.S.C. § 7703(c) (1988)[5].~ This means that with regard to factual findings and conclusions, we review the Board's decision to determine if there is substantial evidence in the record supporting factual findings, and to ensure that, in light of that evidence, conclusions of fact and decisions emanating therefrom are not arbitrary or capricious. Petitioner is of the view that this standard applies to his appeal, and that we may determine whether the record supports the Board's assessment of the medical evidence regarding Petitioner's disability.

[2] The Government, on the other hand, is of the view that Congress has restricted access to judicial review in disability retirement cases, and that, under 5 U.S.C. § 8461(d), the Board's factual findings and conclusions regarding the medical evidence are essentially unreviewable. We contemplate the Government's argument with appropriate skepticism, since, as the Supreme Court has said, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Lab. v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511-12, 18 L.Ed.2d 681 (1967); see also Dunlop v. Bachowski, 421 U.S. 560, 567-68, 95 S.Ct. 1851, 1857-58, 44 L.Ed.2d 377 (1975). Nevertheless, we conclude that under the applicable law the Government is correct, and our scope of review of FERS

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[5] 5. Section 7703(c) provides that "[i]n any case filed in the [Federal Circuit], the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-(l) arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. . . .

disability retirement determinations is substantially truncated.

[3] Section 8461 of Title 5, which sets out OPM's authority to administer FERS benefits, including disability retirement, provides that OPM "shall determine questions of disability and dependency," and that "[e)xcept to the extent provided under subsection (e), the decisions of [OPMI concerning these matters are final and conclusive and are not subject to review." 5 U.S.C. § 8461(d) (emphasis added). Subsection (e) provides;

(e)(1) Subject to paragraph (2), an administrative action or order affecting the rights or interests of an individual or of the United States under the provisions of this chapter administered by [OPM] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

~ (e)(2) In the case of any individual found by [OPM] to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for the purposes of disability retirement under section 8451, the procedures under section 7701 [authorizing Board review] shall apply and the decision of the Board shall be subject to judicial review [by the Federal Circuit] under section 7703.

5 U.S.C. § 8461(e).

These provisions on their face indicate that, except with respect to findings under subsection (e)(2) concerning an applicant's mental condition (which are subject to review by this court under the APA standard of § 7703), OPM's factual findings and conclusions on disability may be reviewed only by the Board (under subsection (e)(1)) and not by this court. Moreover, these provisions mirror 5 U.S.C. §~ 8347(c) and (d), which apply to disability determinations under the CSRS. See 5 U.S.C. §~ 8347(c) and (d).

In Lindahl v. Office of Personnel Management, 470 U.S. 768, 791, 105 S.Ct. 1620, 1633, 84 L.Ed.2d 674 (1985), the Supreme Court interpreted the CSRS provisions to preclude judicial review of the "factual underpinnings" of disability determinations. However, contrary to the conclusion

reached by a majority of this court sitting in banc, Lindahl v. Office of Personnel Managemen4 718 F.2d 391 (Fed.Cir.1983) (in banc), the Supreme Court, itself divided, held that Congress had not withdrawn all judicial review of physical disability retirement determinations under § 8347. The statute did not preclude review of whether there had been "'a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination." Lindah4 470 U.S. at 791, 105 S.Ct. at 1633 (quoting Scroggins v. United States, 397 F.2d 295, 184 Ct.Cl. 530, cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968) (internal quotation marks omitted))[6]. The Court majority examined the legislative history surrounding amendments to § 8347 in 1980, which added § 8347(d)(2) to provide judicial review of factual findings regarding the mental condition of involuntarily retired

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[6] 6. In Scroggins v. United States, 397 F.2d 295, 184 Ct.Cl. 530, cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968), the Court of Claims held that the finality provision in § 8347 precluded it from reviewing an appeal of an involuntary retirement following a finding of mental disabili ty by OPM's predecessor, the Civil Service Commission. 397 F.2d at 297. Quoting its finding in an earlier involuntary retirement case, the court stated that at best a court can set aside the Commission s determination only where there

has been a substantial departure from important procedural rights, a misconstruction of the govI erning legislation, or some like error "going to I. the heart of the administrative determination,"'" Scrnggins, 397 F.2d at 297 (quoting Gaines v. United States, 158 Ct.Cl. 497, 502, 1962

WL 9303 cart denied 371 U 5 936 83 5 Ct 309 L 9LEd2d 271 (1962)) The court found no such k error in Scroggins' case. Scroggins, 397 F.2d at 298~300 & n. 7.

employees.[7] The Court found that in enacting this amendment, Congress was aware that the so-called "Scroggins" standard of review was considered to apply to disability retirement determinations generally, and did not indicate any intent to eliminate such review. Id. 470 U.S. at 780-85, 787, 105 S.Ct. at 1627-30, 1631. The majority concluded that the 1980 amendments had preserved Scroggins review generally, and simply replaced such review with traditional APA review, including substantial evidence review of factual findings, in cases involving the mental condition of an involuntarily retired employee. Id. at 781-82, 105 S.Ct. at 1627_28.[8]

This court of course follows Lindahl in reviewing CSRS disability retirement determinations. Under this standard we

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[7] 7 The impetus for this amendment was the perception that several agencies "had used involuntary mental disability retirements as a disciplinary tool against unpopular employees and ... the finality language of § 8347(c) had worked a 'devastating effect' on the ability of courts to scrutinize the evidentiary underpinnings of such dismissals." Lindahl, 470 U.S. at 783, 105 S.Ct. at 1629 (quotation omitted).

[8] 8. Four Justices dissented, arguing that the statutory language on its face clearly limited review of OPM's disability retirement decisions to the Board, except in cases involving the employee's mental condition, and that the legislative history amply supported this view. 470 U.S. at 801, 804-10, 105 S.Ct. at 1638-39, 1639-40 (White, J., dissenting). The dissent disagreed with the majority's characterization of events surrounding the 1980 amendments. Rather than "reenacting" the finality provision of § 8347 and implicitly ratifying Scroggins review for disability cases generally, the dissent argued, Congress simply created a limited exception to an otherwise complete bar to judicial review of disability retirement determinations. Id. at 802-03, 105 S.Ct. at 1639. However, unless and until the Supreme Court alters its interpretation of § 8347, there is no basis for this court to reexamine that issue.

must reject challenges to the Board's factual determinations on physical disability. See, e.g., Smith v. Office of Personnel Managemen4 784 F.2d 397, 399 (Fed.Cir.1986) (challenge to sufficiency of evidence of disability was not error going to heart of administrative determination); McEachern v. Office of Personnel Managemen4 776 F.2d 1539, 1545 (Fed.Cir. 1985) ('We cannot substitute our judgment on medical evidence for a determination of the Board."); Smith v. Office of Personnel Managemen4 760 F.2d 244, 246 (Fed.Cir. 1985) (refusing to review medical statements and bills); cf Bruner v. Office of Personnel Management, 996 F.2d 290, 291 (Fed.Cir. 1993) (Board's failure to allocate properly burdens of production and persuasion was reviewable because it implicated important procedural right and error going to heart of administrative determination).

We conclude that the same standard should apply to our review of FERS disability determinations. As noted above, §~ 8461(d) and (e)(1) and (2) are worded identically to §~ 8347(c) and (d)(1) and (2). Both statutes serve the same purpose of identifying the scope of OPM's authority to administer disability retirement and other benefits. Similarity of language and purpose argues strongly for applying the same interpretation to both § 8461 and § 8347. See O8car Mayer and Co. v. Evans, 441 U.S. 750, 756, 760, 99 S.Ct. 2066, 2073-74, 60 L.Ed.2d 609 (1979); Northcross v. Memphis Bd. of Educ., 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973),

Additionally, Congress enacted the FERS scheme, including OPM administration of that scheme under § 8461, after Lindahl was decided. Pub.L. No. 99-335, Title I, § 101(a), 100 Stat. 514, 516 (1986). Presumably Congress knew that Lindahl precluded judicial review of the Board's factual determinations on physical disability under CSRS, and intended that limitation to apply to FERS disability determinations as well. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-82 & n. 66, 102 S.Ct. 1825, 1840-41 & n. 66, 72 L.Ed.2d 182 (1982) (" 'where, as here, Congress adopts a new law incorporating

sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.' ") (quoting Lorillard v. Pons, 434 U.S. 575, 580-81, 98 S.Ct. 866, 869-70, 55 L.Ed.2d 40 (1978)); Lindaht, 470 U.S. at 782-83, 105 S.Ct. at 1628-29 (Congress' failure expressly to repeal prior judicial construction of scope of review of disability determinations creates presumption that Congress intended to embody that construction in amended statute). Nothing in the legislative history of § 8461 indicates that Congress intended a different scope of review of disability determinations from that applied under § 8347.

[4] Accordingly, we hold that this court is precluded by 5 U.S.C. § 8461(d) from reviewing the factual underpinnings of physical disability determinations, but may address whether there has been a "substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" Lindahl 470 U.S. at 791, 105 S.Ct. at 1633 (quotation omitted). Petitioner does not assert that the Board's disability findings implicated any procedural, legal, or other fundamental error; he simply asserts that the Board wrongly weighed the evidence, a claim we may not address.

II.

We may address Petitioner's claim that the light-duty position was not permanent or full-time and thus not of the same tenure and grade or pay level as the regular distribution clerk position. Such claim concerns the proper construction of the Postal Service offer and of the National Agreement, raising questions of law rather than of fact. Moreover, this claim does not concern Petitioner's ability satisfactorily to perform in the light-duty position, but whether that position properly may be considered in determining Petitioner's eligibility for benefits. If not, then relying on that position to deny benefits would constitute an

error "going to the heart of the administrative determination."

A. Full-Time

[5] Petitioner first argues that the Postal Service effectively offered a less than fulltime position. Petitioner bases this assertion on the fact that the offer expressly contemplated Petitioner's working less than fulltime if his doctor so advised, and the Postal Service already had received Dr. Cohen's May 9, 1990 letter advising that Petitioner may have difficulty working a full-time F schedule.

We disagree with Petitioner's reading of the offer. The light-duty position on its face was full-time, covering 44.16 hours per week. While the offer states that Petitioner "may work 2400 to 650 [i.e., midnight to 6:50 a.m. or 44.16 hours per week] or less depending on the advice of Dr. Cohen," this meant simply that Petitioner could work full-time hours until, based on Dr. Cohen's advice, he chose to work a reduced schedule. We find nothing in Dr. Cohen's equivocal remarks- that Petitioner "probably can be expected to have difficulty with a 40 hour work week and, possibly, should even be considered for working less than a 40 hour work week"-to require a different interpretation of the Postal Service's offer.

[6] Petitioner further asserts that the light-duty position is less than full-time because the National Agreement allows the Postal Service to send light-duty employees home early without full-time pay on occasions when there is a shortage of work. See United State Postal Service v. American Postal Workers Union, Case No. HIC-4E-C-35208 (1987) (Mittenthal, Arb.), at 4-7 ("Mittenthal award"); Gamble v. United States Postal Serv., 48 M.S.P.R. 228 (1991) (employee sent home early during work shortages was collaterally estopped by Mittenthal award from claiming entitlement to full-time light-duty work). Although he does not cite them, Petitioner's argument also implicates 5 U.S.C. § 8451(a)(2)(D) and 5 C.F.R. § 844.102, which require that a proposed reassignment of a Postal Service employee not be inconsistent with the terms of a collective-bargaining

agreement covering the employee. See 5 U.S.C. § 8451(a)(2)(D); 5 C.F.R. § 844.102.

Again, we reject Petitioner's argument. In the Mittenthal award, the arbitrator construed Article 13 §~ 3B and 3C of the National Agreement, which provided respectively that light-duty assignments may be created from part-time hours, and that light-duty employees' "tour hours, work location and basic work week shall be those of the light duty assignment and the needs of the service, whether or not the same as for the employee's previous duty assignment." Collective Bargaining Agreement Between American Postal Workers Union, AFL-CIO and U.S. Postal Service, Nov. 21, 1990-Nov. 20, 1994, at 62-63; Mittenthal award, at 5-6. The arbitrator concluded from these provisions that the Postal Service could send light-duty employees home early without full-time pay during occasional work shortages, without violating Article 8, which states that a full-time position shall be 8 hours per day and 40 hours per week.

First, it is unclear whether Article 13 applies to Petitioner at all, as that provision addresses requests for light-duty work voluntarily submitted by injured employees. See Collective Bargaining Agreement Between American Postal Workers Union, AFL-CIO and U.S. Postal Service, Nov. 21, 1990-Nov. 20, 1994, at 60. Here, Petitioner did not voluntarily request light-duty assignment; rather, the agency offered it to him pursuant to 5 U.S.C. § 8451(a)(2)(B). Nor has Petitioner alleged or shown that his light-duty position was created from part-time hours. Petitioner's concerns arising from the operation of Article 13, therefore, appear misplaced.

Second, even assuming that Article 13 applies, we see no inconsistency with the National Agreement in considering Petitioner's reassignment to be full-time. Whatever the National Agreement permits the Postal Service to do in the event of an occasional work shortage, it does not require the Postal Service to provide less than full-time hours to light-duty employees. We see nothing in Article 13 to preclude the Postal Service from committing itself, as it did in this case, to provide full-time light-duty hours.

Accepting Petitioner's position effectively would invalidate all light-duty positions ab initio as reassignments for injured full-time employees. Such limitations are not required by the statute, regulations, or the National Agreement, and we decline to impose them here.

B. Permanent

[7] Petitioner also argues that the lightduty position is not permanent, and thus not of the same tenure as the regular distribution clerk position, because the Postal Service has not provided a written description of the position as permanent. This argument is without merit. OPM regulations define a "permanent position" as "an appointment without time limitation," and "tenure" as "the period of time an employee may reasonably expect to serve under his current appointment." 5 C.F.R. §~ 844.102, 210.102(b)(17) (1994). The Board found, and Petitioner does not dispute, that the Postal Service offered Petitioner the light-duty position for as long as he remained disabled. In other words, it was an appointment without time limitation (except, of course, to the extent that Petitioner's disability ceased and he could return to regular duties), and Petitioner reasonably could expect to hold the position for the duration of his disability. The lack of a written statement of permanence is irrelevant, when nothing in the record suggests impermanence.[9]

Accordingly, we find that the Board did not err in concluding that Petitioner had failed to prove that the light-duty position was not permanent or full-time and was not a reasonable offer of reassignment.

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[9] 9. Nor does the National Agreement in any way render the light-duty position impermanent; notably, both the National Agreement and the Pittsfield Office Memorandum of Understanding implementing the National Agreement, expressly provide for permanent light-duty positions.

CONCLUSION

For the reasons discussed above, the decision of the Board is

AFFIRMED

APPENDIX 0
August 25, 2003 REPLY BY APPELLANT TO AGENCY RESPONSE TO MSPB ORDER in *ALLEN v OPM*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ETHAN E. ALLEN, Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency,

DOCKET NUMBER SF-844E-0 I -0326-M- I

DATE: August25, 2003

REPLY BY APPELLANT TO AGENCY RESPONSE TO MSPB ORDER

Appellant was formerly proceeding pro se. Attached is a designation of representative appointing the undersigned as Appellant's representative. This constitutes Appellant's reply to the Agency response to the June 27, 2003 ORDER by the Merit Systems Protection Board,

The ORDER by the Merit Systems Protection Board resulted from a remand of this disability retirement case from the U.S. Court of Appeals for the Federal Circuit, on motion by the Office of Personnel Management. In that motion, OPM cited evidence that the Board had not addressed and noted that a witness requested by Appellant had been denied. The three questions that O.P.M. suggested be remanded to the MSPB were:

1) *What is the legal standard for determining when attendance problems constitute a deficiency?*

2) *Did the appellant demonstrate a deficiency in attendance?*

3) *If there was a deficiency, was the appellant's employing agency accommodation of that deficiency temporary or permanent?*

After remand, the Board has stated in its ORDER that it finds it would be helpful to hear from the parties on these issues,

FACTUAL BACKGROUND

Appellant served *for* ten years with his employing agency, Department of Navy and was serving in a Computer Scientist, GS-1550-12 position during the relevant time period. On December 22, *1995* Appellant was involved in a serious automobile accident. This caused him to be absent from work and not to return to full duty until March 1996. After returning to work, Appellant experienced continuing pain in his neck, lower back, and left knee. The pain, medication he took in response and his efforts at physical and pain management therapy to cope with the pain resulted in significant and continuing absences from work, Despite continuing treatment, including arthroscopic surgery, Appellant's condition worsened and the amount of leave he took increased[1]. The condition was termed 'chronic" by Appellant's treating physician, Dr. John 1. Malone, who opined that the condition would not improve in the foreseeable future.

Appellant's former supervisor, Bob Williamson, wrote that Appellant had used all of his accumulated leave as well as leave without pay because of Appellant's physical condition

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[1] records indicate that Appellant was forced to be absent and take sick, annual or leave without pay more than 25% of the time from 1996 until he left the employing agency in November 30, 1999. The absences increased *over time,* with, 1999 showing the highest percentage of absences.

and noted that Appellant exhibited considerable, recurring and persistent pain that reduced his mobility. While noting that Appellant's performance was not unsatisfactory, Mr. Williamson wrote that Appellant's delivery times had to be increased. In November, 1998, the Employee Relations Specialist, Maria Jamini-Ramirez[2] wrote to Appellant's supervisor,

> As I mentioned before, my concern with this situation is that Ethan may be trying to work apart time schedule filling the not-worked hours with a combination of sick leave, annual leave and LWOP. This is not acceptable,

ARGUMENT

Remand of this Case Furthers Resolution. This Case Presents A Situation Where Appellant Demonstrated a Deficiency in Attendance, Although He Was Considered Otherwise to Be Performing Acceptably.

Eligibility for disability retirement is premised on a showing that the medical condition causes 'a deficiency in performance, conduct, **or** attendance,." (Emphasis added) 5 U.S.C. 8451 AND 5 CF.R. 844.103(a). Thus, the statute and governing regulations contemplate that either a showing of performance or attendance deficiency may suffice to establish eligibility for disability retirement; In other words, there is no requirement that an employee show both an attendance deficiency and a performance deficiency to establish eligibility for disability retirement. The

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[2] Ms. Jamini-Ramirez was one of the two witnesses requested by Appellant that were rejected by the Administrative Judge.

Administrative Judge assumed in her Initial Decision, affirmed summarily by the Board, that both had to be shown by Appellant. Therefore, remand to consider the questions posed furthers resolution and, as argued below, indicates that disability retirement should be awarded in this case.

The Legal Standard for Determining When Attendance Problems Constitute a Deficiency Should Be A Flexible One Adaptive to the Facts of Each Case. In this Case, the Duration and Frequency of the Absences Must Be Considered.

It would be a mistake to draw a bright line standard regarding when attendance problems constitute a deficiency for the purposes of a disability retirement analysis. Certainly, the first analysis must consider whether the absences are attributable to a medical condition, Obviously as the Board has held, absences by themselves do not establish disability. Rather, as in this case, when the absences are tied to a medical condition by medical reports and the subjective reports of the employee, as well as the leave documents of record~ the next consideration must look to the extent of the absences, Among the factors that reasonably should be considered, are the duration of die absences and their frequency and whether the absences are increasing or decreasing,

In this case, the record shows that Appellant's chronic medical condition caused him to be absent in excess of 25% of the time over a four year period. Additionally, the frequency of the absences increased as time went on. It is plain that Appellant's attendance was deficient because of his medical condition.

Other factors to be considered include whether the employee's supervisors considered the absence record to be unacceptable. In this case the evidence is mixed. On the one hand, Appellant's last supervisor wrote that she considered Appellant's attendance to be acceptable. However, his prior supervisor remarked as to the delay in getting the work done because of the absences. In November, 1998 the Employee

Relations Specialist wrote to Appellant's supervisor regarding the unacceptable nature of his attendance record. It should also be noted that the Agency was gearing down for a Reduction-in-Force and that the levels of expectation wore reasonably less stringent[3]. It is our belief that the subjective opinion of supervisors, while to be considered, is not dispositive, but is one of several factors to be considered.

Appellant Demonstrated a Deficiency in Attendance.

Appellant had to miss over 25% of his work time due to his medical condition. The frequency of his absences increased over time as his chronic condition continued to worsen. While the Agency limped along getting ready for base closure and a Reduction-In-Force, from an objective point of view it cannot be said that working less than 3/4 time is acceptable, The job that Appellant was hired for was a 40 hour a week job that required him to complete projects to the satisfaction of his supervisors and customers. If the employing agency chose to ignore Appellant's absences, or expect less work from him or hold him to lower standards this does not change the fact that Appellant's medical condition prevented him from accomplishing the number one requirement of any job '—regular attendance

It is ironic that Appellant was allowed to continue with the employing agency until the RIF occurred. Because he had applied for disability retirement, Appellant was not allowed to be placed on the Priority Placement List, nor was he hired by another federal agency. Appellant's condition is severe enough that he cannot work at any other job on a regular full-time basis, Yet, he is being denied disability retirement

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[3] It should be further noted that Appellant had attempted to demonstrate through witnesses, rejected by the Administrative Judge, that Agency officials were counseling him to apply for disability retirement in June, 1999 because of his medical condition and consequent absences.

because his employing agency kept him on and did not claim that his performance or attendance had become less than acceptable, despite the fact that he was forced to miss over 25% of work time over the four years prior to the RIF. These facts dictate that Appellant's attendance was deficient as a result of his medical condition.

It Is Unclear What Accommodation Was Provided By the Agency, Other Than to Ignore Appellant's Deficient Attendance.

There is no reasonable way for an employing agency to accommodate an employee whose medical condition requires the duration and frequency of absences that were present in Appellant's case. The fact that the employing agency was able to ignore Appellant's absences must be considered, at best, a temporary and incomplete accommodation. Had the facility not been closed and Appellant's position not been abolished, the 'accommodation" would have ended abruptly. No federal agency can tolerate an employee that can only work part-time in a full-time position because of his medical condition,

CONCLUSION

Remand is appropriate to address the specific issue presented by this case. A review of the record reveals that for the four years prior to abolishment of his position, Appellant was able to work less than 75% of time because of his chronic medical condition, No permanent accommodation is possible. Appellant has established that due to his attendance deficiency caused by his chronic medical condition, he should be awarded disability retirement.

Respectfully Submitted

"s/David S. Hansher"

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APPENDIX P
BRACEY V OPM MSPB Docket No DC-831E-97-0643-M-1 Date: August 28, 2001

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRUCE A. BRACEY,
Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
DC-831E-97-0643-M-1

DATE: August 28, 2001

Bruce A. Bracey, Norfolk, Virginia, pro se.

David M. Cohen, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board on remand from the U.S. Court of Appeals for the Federal Circuit, which reversed the Board's decision affirming the determination of the Office of Personnel Management (OPM) that the appellant was not eligible for disability retirement benefits. *Bracey v. Office of Personnel Management,* 236 F.3d 1356 (2001). For the reasons set forth below, the Board reverses the final decision issued by OPM denying Mr. Bracey's application for disability retirement and ORDERS OPM to award him disability retirement benefits.

BACKGROUND

¶2 The appellant, an Electronics Worker, WG-8, suffered various injuries beginning in 1991, which damaged his

neck, shoulders, head, arms, hands, fingers, back, shoulder blades, legs, and hips. His employing agency, the Department of the Navy, placed him on light duty between 1991 and 1993, and again between April 1995, and September 28, 1996. At that time, he was separated through reduction in force (RIF) procedures because of the closure of the entire facility at which he worked. On September 13, 1996, the appellant filed an application for disability retirement under the Civil Service Retirement System (CSRS) based on his numerous physical problems. Initial Appeal File (IAF), Tab 3, Subtab B.

¶3 OPM denied the appellant's application based on the fact that, despite the medical evidence which established that he suffered injuries resulting in chronic pain syndrome, restricting him to working light/sedentary duties, he was not entitled to disability annuity because there were no service deficiencies with respect to his performance, attendance, or conduct. IAF, Tab 3, Subtab A. OPM also found that his employing agency had provided him light-duty work consistent with his medical restrictions, there was no evidence that he was required to perform any duties outside of his restrictions, and there was no indication that the accommodation would have stopped if the RIF had not occurred. *Id.*

¶4 On appeal to the Merit Systems Protection Board, following a hearing, the administrative judge reversed OPM's determination. He found that OPM admitted that the appellant met all of the criteria for obtaining a disability retirement annuity with the exception of showing that his employing agency could not accommodate his medical condition. The administrative judge further found that the appellant's assignment to light duty was not an accommodation because the light duties were not those of an Electronics Worker (his position of record) but were those of a Material Examiner and Identifier, a lower-graded position.

¶5 OPM petitioned for review to the full Board, which reversed the initial decision. The Board held that although the light-duty assignments were not those of his Electronics Worker position, the appellant had retained the grade and pay of that position, and he therefore was not eligible for a disability retirement annuity. *Bracey v. Office of Personnel*

Management, 83 M.S.P.R. 400, ¶ 25 (1999). Then Vice Chair Slavet dissented, explaining that under the governing statute, 5 U.S.C. § 8337(a), a disabled employee is eligible for disability retirement unless the employee is able to render "useful and efficient service in the employee's position" or is qualified for reassignment to an existing vacant position in the agency at the same grade or level. *Id.* at 413. In Vice Chairman Slavet's view, Mr. Bracey was not rendered ineligible for disability retirement because (1) he was not qualified for reassignment to a vacant position within the agency, and (2) he was not rendering "useful and efficient service" in his Electronics Worker position, as the work he was assigned was not within the duties of that position. *Id.* at 414.

¶6 Mr. Bracey appealed to the Federal Circuit, and the court reversed and remanded his case to the Board, finding that his light-duty assignment did not constitute an accommodation of his disability since those duties were not those of his official position nor did it constitute an assignment to a vacant position at the same grade and pay. *Bracey*, 236 F.3d at 1363.

ANALYSIS

¶7 In order to qualify for disability retirement, the appellant must have completed five years of civilian service, must be unable, because of disease or injury, to render useful and efficient service in his position, and must not be qualified for reassignment to a vacant position which is in his agency at the same grade level and in which he would be able to render useful and efficient service. 5 U.S.C. § 8337(a). In the initial decision, the administrative judge found that aside from the accommodation issue, OPM acknowledged that the appellant met all the other criteria for a disability retirement. IAF, Tab 12, ID at 3

¶8 Because the Federal Circuit held that the light-duty assignment that Mr. Bracey was given was not an accommodation within the meaning of the statute, and because the Board previously found that he satisfied all the other criteria, we reverse OPM's final decision and order OPM to award the appellant disability retirement benefits.

ORDER

¶9 We ORDER the Office of Personnel Management (OPM) to award the appellant disability retirement. OPM must complete this action no later than 20 days after the date of this decision.

¶10 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶11 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

FOR THE BOARD:

Washington, D.C.

_____

Robert E. Taylor
Clerk of the Board

APENDIX Q
Hypes v First Commerce Corporation
Case No. 96-31133 (5th Cir., Feb 12, 1998)

Hypes was hired by FCC in February of 1993, as a Loan Review Analyst assigned to a Consumer Assessment Team in the Independent Review Services Division. He worked in that position until April 27, 1994, when he was reassigned to a Commercial Portfolio Team. Hypes was not "otherwise qualified" for his job because: 1) as the district court correctly concluded, it was an essential function of his job, as a member of a team, that Hypes be in the office, regularly, as near to normal business hours as possible, and that he work a full schedule; and 2) even with the requested flex-time accommodation, Hypes could not arrive at work early enough or often enough to perform the essential functions of the job. The evidence demonstrates that this was not the sort of job which could be done at home. Hypes' job required him to review various confidential loan documents, which could not be taken from the office. "An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 544 (7th Cir.1995). Furthermore, he was a part of a team and the efficient functioning of the team necessitated the presence of all members. "[T]eam work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance." Id. at 544. Therefore, it was critical to the performance of his essential functions for Hypes to be present in the office regularly and as near as possible to normal business hours. Other courts are in agreement that regular attendance is an essential function of most jobs. Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir.1996) ("[a]n essential element of any government job is an ability to appear for work ... and to complete assigned tasks within a reasonable period of time") (quoting Carr v. Reno, 23 F.3d 525, 530 (D.C.Cir.1994)). See also Tyndall v. Nat'l Educ. Centers, Inc. of Cal., 31 F.3d 209, 213 (4th Cir.1994) ("a regular and reliable level of attendance is a necessary element of most jobs"); Law v. United States Postal Serv., 852 F.2d 1278, 1279-80 (Fed.Cir.1988) (holding that "an agency is inherently

entitled to require an employee to be present during scheduled work times, and, unless an agency is notified in advance, an employee's absence is disruptive to the agency's efficient operation"); Walders v. Garrett, 765 F.Supp. 303, 309-10 (E.D.Va.1991) (holding that "employees cannot perform their jobs successfully without meeting some threshold of both attendance and regularity[;] the necessary level of attendance and regularity is a question of degree depending on the circumstances of each position, ... however, ... some degree of regular, predictable attendance is fundamental to most jobs"), aff'd, 956 F.2d 1163 (4th Cir.1992); Santiago v. Temple Univ., 739 F.Supp. 974, 979 (E.D.Pa.1990) ("attendance is necessarily the fundamental prerequisite to job qualification"), aff'd, 928 F.2d 396 (3d Cir.1991).

Certificate of Service

I hereby certify under penalty of perjury that a true and correct copy of the attached document was sent this day, July 7, 2004, by first class mail to:

J Reid Proity
Department of Justice
1100 L St. NW
Washington DC 20530

Ethan E Allen

Ethan E. Allen, Petitioner